No. 01-1444-CFX Title: Ben Chavez, Petitioner
v.
Oliverio Martinez

Docketed: April 3, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Mar 26 2002	Petition for writ of certiorari filed. (Response due May 3, 2002)
	May 2 2002	Brief of respondent Oliverio Martinez in opposition filed.
	May 14 2002	DISTRIBUTED for Conference of May 30, 2002
	Jun 3 2002	Petition GRANTED. SET FOR ARGUMENT December 4, 2002. **********
	Jun 21 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 16, 2002.
	Jul 29 2002	Order extending time to file September 5, 2002.
	Aug 27 2002	Order extending time to file respondent's brief on the merits to and including October 25, 2002.
	Aug 29 2002	Brief amicus curiae of National Association of Police Organizations filed.
	Sep 4 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Sep 5 2002	Joint appendix filed.
	Sep 5 2002	Brief of petitioner Ben Chavez filed.
	Sep 5 2002	Brief amicus curiae of City of Escondido filed.
	Sep 5 2002	Brief amicus curiae of California filed.
	Sep 5 2002	Brief amicus curiae of the United States filed.
	Sep 5 2002	Brief amici curiae of Fifty California Cities, et al. filed.
	Oct 18 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Oct 25 2002	Brief amicus curiae of American Civil Liberties Union filed.
	Oct 25 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Oct 25 2002	Brief amici curiae of National Police Accountability Project, et al. filed.
	Oct 28 2002	Brief of respondent Oliverio Martinez filed.
	Nov 1 2002	Record filed.
	Nov 1 2002	CIRCULATED.
	Nov 18 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 20 2002	Reply brief of petitioner Ben Chavez filed.
	Nov 26 2002	LODGING consisting of twenty copies of tape recorded statement of Martinez, transcribed on p.6-22 of Joint appendix received from counsel for respondent and distributed.
	Dec 4 2002	ARGUED.

Supreme Court, U.S.
FILED

No. 01 4444 MAR 26 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ALAN E. WISOTSKY
Counsel of Record
JEFFREY HELD
LAW OFFICES OF ALAN E. WISOTSKY
300 Esplanade Drive, Suite 1500
Oxnard, California 93030
(805) 278-0920
(805) 278-0289 (fax)

GARY L. GILLIG
City Attorney
CITY OF OXNARD
300 West Third Street
Oxnard, California 93030

Attorneys for Petitioner

58pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit panel correctly characterized the Supreme Court's Fifth Amendment discussion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), as non-binding dicta and thereby ignored its holding favorable to petitioner.

2. Whether a violation of the Fifth Amendment, potentially resulting in an award of civil damages, occurs at the time of the purported coercive interview or only when and if the state introduces the constitutionally violative statement in a criminal proceeding.

3. Whether the Ninth Circuit panel correctly held that the conduct of this investigating officer was so offensive as to deny him qualified immunity.

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Appendix A — Opinion of the United States Court of Appeals for the Ninth Circuit Filed October 30, 2001 ..... 1a

Appendix B — Order of the United States District Court for the Central District of California Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication Filed August 1, 2000 ..... 15a

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Petitioner, Ben Chavez, respectfully requests a petition for writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") dated October 30, 2001, is reported at *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001). The United States District Court issued an unreported decision dated August 1, 2000, granting respondent's motion for summary adjudication of his Fifth Amendment claim.

BASIS FOR JURISDICTION IN THIS COURT

The order denying the petition for rehearing and suggestion for rehearing en banc was entered on December 26, 2001.

The statutory provision conferring upon this Court jurisdiction to review on a writ of certiorari the judgment and order in question is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In accordance with Supreme Court Rule 14(f), petitioner sets forth the constitutional provision and statute, in relevant part, involved in this case:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

U.S. Const., amend. V.

The statute at issue provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. §1983.

STATEMENT OF THE CASE

The Ninth Circuit's published decision in *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001), generally sets forth the facts of this case. Petitioner does not agree with the Ninth Circuit's determination of the length of the challenged interview.

As noted in the petition for rehearing and suggestion for rehearing en banc, filed in the Ninth Circuit on November 14, 2001, the decision contained an important misstatement of fact: "the interview lasted 45 minutes." 270 F.3d at 854. The record is clear that although petitioner was present in the emergency room for approximately 45 minutes, the total length of his interview of the respondent was in fact only 10 minutes and 7 seconds (excerpts of record, p. 451:10-14, and p. 4 of petition for rehearing.)

In the district court, respondent asserted that his Fourth Amendment and Fifth Amendment rights were violated by various police officers of the City of Oxnard. The Fourth Amendment theories of liability were predicated upon respondent having been shot by Oxnard police officers.

Following the shooting, police officers arranged for the transportation of the respondent to the local hospital, St. John's Regional Medical Center. Respondent had sustained large-caliber bullet wounds to his head and upper torso. Petitioner believed that respondent had very little

chance of survival, a belief which was reinforced by respondent's statement, "I am dying."

In the belief that respondent's account of the officer-involved shooting would soon die with him, petitioner tape-recorded his efforts over a ten-minute and seven-second time span to elicit respondent's version of events. Respondent's second theory of liability is that the interview was coercive and in violation of his Fifth Amendment right against self-incrimination.

Respondent moved for summary judgment as to both the Fourth Amendment and Fifth Amendment claims. The district court denied summary judgment as to the Fourth Amendment claim but granted respondent's summary judgment as to his Fifth Amendment claim.

Having asserted the defense of qualified immunity to the Fifth Amendment claim, petitioner sought interlocutory review. Respondent did not appeal the denial of his summary judgment as to the Fourth Amendment claim.

Following briefing and argument, the Ninth Circuit published its opinion, holding that: (1) statements by this Court that the Fifth Amendment right against self-incrimination was a trial right were dicta; (2) there was a private right of action for an alleged *Miranda* violation notwithstanding there was never a criminal proceeding in which the allegedly coerced statements were sought to be adduced by the state; and, finally, (3) the asserted parallels which the current facts bore to those in this Court's decision in *Mincey v. Arizona*, 437 U.S. 385 (1978),

foreclosed qualified immunity to the petitioner. The petition for rehearing and suggestion for rehearing en banc was denied on December 26, 2001.

REASONS FOR GRANTING THE WRIT

I.

A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In order to reach its conclusion in this case that there is a private right of action for violation of the Fifth Amendment right against self-incrimination, even though the allegedly coerced statements are never introduced in any criminal proceeding, the Ninth Circuit characterized a number of pronouncements by this Court as *obiter dicta*. The Ninth Circuit stated, "We recognize the existence of Supreme Court dicta to the contrary." 270 F.3d at 857. The Ninth Circuit panel thereby declined to follow this Court's explanation of the Fifth Amendment right against self-incrimination as a fundamental trial right whose violation occurs only when the prosecutor attempts to introduce the allegedly coerced statement into evidence during some phase of a criminal proceeding.

The Ninth Circuit wrote, "Where the two [Supreme Court dicta and Ninth Circuit holdings] are at odds, however, we are bound to follow our own binding precedent rather than Supreme Court dicta." 270 F.3d at

857, n.3. The Ninth Circuit was referring to its two prior decisions (*Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999)), which held that there was a private right of action for violation of the Fifth Amendment even if the inculpatory statements were never sought to be introduced in any criminal proceeding.

The suggestion for rehearing en banc, pages 16-20, urged the Ninth Circuit to reconsider its ruling en banc because of the erroneous characterization of numerous pronouncements by this Court as mere dicta. The Ninth Circuit refused to do so.

It is second nature, when approaching *Fourth* Amendment violations, to assume that the time of the conduct is also the time of the violation. But the Ninth Circuit erred in applying this temporal analysis to the *Fifth* Amendment. A careful review of the text of the Fifth Amendment, in combination with numerous pronouncements by this Court, reveals that the Fifth Amendment provides a criminal proceeding protection as opposed to a generalized private right of action.

The text of the Fifth Amendment is the starting point of the analysis. The Fifth Amendment confines its application to "any criminal case." The protection is against a person being compelled "in any criminal case" to be a witness against himself. In contrast, the Fourth Amendment speaks emphatically and without limitation, providing that the right of the people to be secure in their

persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right of criminal defendants. *Malloy v. Hogan*, 378 U.S. 1 (1964). Although conduct by law enforcement officials prior to trial may ultimately impair that right, the constitutional violation occurs only at trial. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

The Fourth Amendment functions differently. That amendment prohibits all unreasonable searches and seizures, whether or not the evidence is ever sought to be used in a criminal proceeding. A violation of the Fourth Amendment is considered fully accomplished at the time of an unreasonable governmental intrusion. *United States v. Calandra*, 414 U.S. 338, 354 (1974); *United States v. Leon*, 468 U.S. 897, 906 (1984).

Decisions of this Court have repeatedly limited the protection of the Fifth Amendment to criminal prosecutions. In *Withrow v. Williams*, 507 U.S. 680, 691 (1993), the Court wrote, "Prophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards a fundamental *trial* right." [Emphasis in original text.]

This Court conducted a searching, comprehensive examination of the issue in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-267 (1990). The amendment being applied in that case was the Fourth Amendment;

nevertheless, the depth of elaboration in the decision makes plain that the Court's reasoning was to compare and contrast the two amendments in order to reach the appropriate conclusion to that case. The Ninth Circuit declined to follow the detailed explanation of this Court on the ground that it was allegedly dicta. Comprehensive discussions of the Bill of Rights contained in the majority opinion of the United States Supreme Court should not be disregarded as dicta.

In *Verdugo-Urquidez*, this Court stated that "Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment . . . ." 494 U.S. at 264. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. It is a right which is properly asserted only during trial and only by defendants in a pending criminal proceeding. *Id.* Even though law enforcement conduct "prior to trial" may be constitutionally violative, "a constitutional violation occurs only at trial." *Id.*

At page 265 the Court explained that contrary to the suggestion of amici curiae that the drafters of the Bill of Rights used the phrase "the people" simply to avoid an awkward rhetorical redundancy, the phrase "the people" seems to have been a term of art employed only in select parts of the Constitution. For example, the Preamble to the Constitution declares that the Constitution was ordained and established by "the people of the United States," and various amendments, such as the Second, Fourth, Ninth, and Tenth, confer rights upon "the people." The language

of those amendments contrasts with the words of the Fifth and Sixth Amendments, which limit themselves to regulating procedure in criminal cases by using the terms "person" and "accused."

The Ninth Circuit's view that a Fifth Amendment private right of action arises at the time of the alleged violation even in the absence of any criminal proceeding is further contradicted by this Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000). The issue in *Dickerson* was whether a congressional enactment could abrogate the requirement of the *Miranda* warnings.

This Court held that the *Miranda* warning-based approach to determining the admissibility of statements made by an accused during a custodial interrogation was constitutionally based and could not be overruled by legislation. In describing its holding in *Dickerson*, the Court stated in the opening paragraph, "We therefore *hold* that *Miranda* and its progeny in this Court govern the *admissibility* of statements made during custodial interrogation in both state and federal courts." *Id.* at 432 [emphasis added].

Many statements in the *Dickerson* opinion clarify that the Fifth Amendment right is strictly a trial right whose violation does not occur until the state attempts to admit the statement into evidence during a criminal proceeding. The *Dickerson* court explained, "We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily," and "Those guidelines established that the admissibility in

evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings." 530 U.S. at 434, 435.

Dickerson clarifies that the Fifth Amendment's self-incrimination clause, incorporated into the due process clause of the Fourteenth Amendment and thus applied to the state, is designed to prevent a person from being compelled to incriminate himself — an event which can only occur during a prosecutorial proceeding in which jeopardy attaches. No jeopardy attaches until the state attempts to convict a person of a charged criminal offense. In the instant case, respondent was never charged with any crime, nor is there any contention that the statements thus elicited were sought to be introduced against him in any criminal proceeding. Thus, on these facts, civil liability against the petitioner should not result.

II.

A UNITED STATES COURT OF APPEALS HAS ISSUED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

In contrast with the Ninth Circuit's decision, 270 F.3d at 857, n.3, the Seventh Circuit has held that a violation of the Fifth Amendment right against self-incrimination occurs only at the time of attempted introduction into

evidence during a criminal proceeding of the allegedly coerced statements. The Seventh Circuit stated:

> But was Mahoney's right not to be compelled to incriminate himself violated? No incriminating statement was made by Mahoney, let alone used against him in a legal proceeding, and we have said that the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case — otherwise, immunity statutes would be unconstitutional.

Mahoney v. Kesery, 976 F.2d 1054, 1061-1062 (7th Cir. 1992).

III.

A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

One of the most important avenues of information-gathering for police officers is questioning witnesses to potential criminal offenses, witnesses who may often be suspects or defendants. This Court has never addressed the issue of qualified immunity as that doctrine applies to

questioning in a hospital environment. No extant Supreme Court decision addresses the civil implications of the *Mincey* decision or whether substantial deviations from the constitutionally offensive conduct which occurred in *Mincey* call the qualified immunity into play.

The rule of qualified immunity provides ample support to all but the plainly incompetent or those who knowingly violate the law. *Burns v. Reed*, 500 U.S. 478, 494-95 (1991). Even conduct constitutionally violative may provide protection for the individual officer if constructive notice of its unconstitutionality has not been provided by previously decided, closely correspondent precedent. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Petitioner is entitled to qualified immunity because the present facts are far less aggravated than those criticized by this Court in *Mincey*. The Ninth Circuit denied petitioner qualified immunity, saying that his interview was more egregious than the one in *Mincey*, but that is not true. There was a cogent reason for interviewing the respondent (to preserve the account of a moribund key witness to an officer-involved shooting). By contrast, no justification other than eliciting a criminal confession from a recovering surgical patient existed in *Mincey*.

In *Mincey*, the interviewee asked "repeatedly that the interrogation stop until he could get a lawyer." 437 U.S. at 396. The text of the interview is set out in the margin at 399, and it appears that there were at least three separate requests for a lawyer. A possible fourth request for a lawyer appears in the text of the *Mincey* decision at 399.

The *Mincey* court underscored the requests to see a lawyer (437 U.S. at 399), presumably because of the primacy of the legal ombudsman to the operation of our system of law. The *Mincey* court emphasized the temporal proximity of the request for counsel to the questions turning to the details of the afternoon's events. As soon as the *Mincey* detective asked about the afternoon's events, the interviewee immediately stated, "This is all I can say without a lawyer."

The hallmark of coercive interrogation decisions is the disregarded request for counsel, which is wholly nonexistent in the current factual setting. Respondent never once asked to see a lawyer, nor did he request any intermediary or ombudsman, such as a priest, parent, or spouse. The absence of any request for counsel in the present facts belies the Ninth Circuit's observation at 270 F.3d 858 that "to the extent Sgt. Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious."

One of the aggravating features of the *Mincey* facts was the enlistment of medical personnel to assist in breaking down the interviewee's will to resist. At 437 U.S. 399, the decision recites that "a nurse who was present suggested it would be best if Mincey answered." No doubt it is very frightening to a seriously injured person to have the very people who are entrusted with his care turn into the confederates of the state.

The present facts have no analogue to that whatsoever. At no time nor in any way did petitioner

attempt to enlist the assistance of the medical personnel attending the respondent, nor did any medical personnel present in the emergency room make any statement which indicated that respondent should cooperate with the interviewer.

A third factual feature separating the present facts from those held constitutionally violative in *Mincey* was the duration of the interview, which in *Mincey* was four hours, from 8:00 p.m. until midnight. 437 U.S. at 396. In contrast, the interview length in the present case was ten minutes and seven seconds. Coercive interrogations are frequently marked by the length of the examination. This difference, in and of itself, strongly contraindicates an overbearing of will.

Also belying the Ninth Circuit's pronouncement that petitioner's conduct was more egregious than that involved in *Mincey* is the fact that the interview in *Mincey* took place in a recovery room (with virtually no one else present), so that the interviewee was "at the complete mercy" of the interrogator. 437 U.S. at 396, 399. In the present case, the interview took place in a busy emergency room with numerous medical personnel in attendance.

This Court has ruled that the presence of non-police personnel substantially dissipates the coerciveness of the environment. *Berkemer v. McCarty*, 468 U.S. 420, 438-439 (1984). If a detention occurs in view of non-police witnesses, public exposure reduces the likelihood that law enforcement agents will use oppressive or abusive tactics and renders the situation substantially less police

dominated. Other courts have reasoned that if the mere presence of uninvolved passersby, such as in *Berkemer*, renders the environment substantially less police dominated, then the presence of medical personnel whose sworn duty is to care for their patient even more strongly dissipates the coerciveness of an environment. *Wilson v. Coon*, 808 F.2d 688, 690 (8th Cir. 1987); *United States v. Kahlil*, 214 F.3d 111, 121 (2d Cir. 2000); *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989).

In the *Mincey* case, the detective did not create any contemporaneous record of the interview, suggesting he was perhaps trying to conceal the degree of coercion. In the present case, petitioner tape-recorded the entirety of the interview. He was not trying to hide anything but, rather, to preserve a moribund key witness's account of recent important events.

In *Mincey*, the interviewee was in no danger of death. He was removed from the emergency room and placed in the intensive care unit; he had sustained a wound to his hip, resulting in damage to his sciatic nerve and partial paralysis of his right leg. The present case, in sharp contrast, has the only non-police witness to an officer-involved shooting in imminent danger of expiration.

At no time did petitioner threaten respondent in any way. He did not state that respondent was going to be arrested or prosecuted or that medical care would be discontinued if he failed to respond to the inquiries.

The great majority of petitioner's questions were not leading or accusatory but were merely designed to elicit respondent's version of events (petitioner asked respondent questions such as "Oliverio — what happened? Oliverio — tell me what happened. What happened, sir? Oliverio, sir, what happened?"). In contrast, the detective in *Mincey* posed a lengthy series of pointedly inculpatory accusations, such as "How did [you] get into the apartment?" . . . . "Did you sell some narcotics to the guy that was shot?" . . . . "Did you give him a sample?" . . . . "A small amount of drug or narcotic to test?" . . . . "Did you shoot anyone?"

One of the salient features of *Mincey* was that the interviewee was not mentally competent, fading in and out of consciousness, giving answers which on their face were not coherent, and periodically actually losing consciousness. The interviewee in *Mincey* was confused to the point that he was unable to think clearly about either the events of that afternoon or the circumstances of his interview. In contrast, the respondent was lucid throughout the interview and never expressed any hallucinations or statements indicating that he was confused or unable to think clearly; his responses made sense.

In *Mincey*, the interviewee's will was undermined by forcing him to write the answers on pieces of paper provided by the hospital. The only contemporaneous record consisted of Mincey's written answers. In the present case, petitioner was Spanish speaking and conducted the interview entirely in respondent's native language.

A number of other features substantially reduced the coerciveness of the questions. At no time did petitioner interfere with the provision of medical care to the respondent. Petitioner was the only police officer who questioned respondent and was the only police officer present in the emergency room (another officer briefly entered to ask petitioner a question and promptly departed). Petitioner never placed respondent under arrest, nor did he ever make any physical contact with respondent. At no time did respondent ever ask petitioner to leave. At no time did petitioner raise his voice or scream or yell at respondent.

In contrast with the Ninth Circuit decision, other courts have held that police interviews of seriously injured individuals in a medical setting are not constitutionally violative. In *United States v. Kahlil, supra,* 214 F.3d 111, a criminal defendant appealed his conviction of participation in a bomb plot by contending that the district court erred in denying his pretrial motion to suppress certain post-arrest statements which he made and in admitting those statements in trial. Following a raid on his apartment, officers questioned him at the hospital about the construction and stability of bombs which they suspected that he helped build or store. He was not given *Miranda* warnings, nor was he told that he had any right to refuse to respond.

The defendant in *Kahlil* moved to suppress his responding statements on the grounds that no *Miranda* warnings were given to him and that his physical condition, as he was being prepared for life-saving surgery, prevented

his answers from being knowing and voluntary. The Second Circuit affirmed the denial of his suppression motion. While his medical condition was grave, it was not such as to prevent his statements from being knowing and voluntary.

In *Campaneria v. Reid, supra,* 891 F.2d 1014, the arrestee was relatively young and foreign-born, with a poor command of the English language. During questioning, he was suffering from a serious knife wound and was in significant pain. The police questioned him at the hospital in the intensive care unit. During questioning, with tubes running in and out of his body, he complained of dizziness.

Despite relentless questioning by multiple police interrogators, the Second Circuit held that the interviewee was not coercively examined. He was generally alert and awake despite his pain. Although there were many interviews, they were all relatively short.

CONCLUSION

Petitioner urges the Court to grant certiorari because the Ninth Circuit decision (1) conflicts with relevant decisions of this Court; (2) conflicts with decisions from other courts on the same subject; and (3) provides an opportunity for this Court to settle the law on an important issue. Also, petitioner contends, for all the reasons stated herein, that the Ninth Circuit's conclusion that the facts in this case are more egregious than in *Mincey* is simply wrong. Under the instant circumstances, petitioner's

conduct should be protected from civil liability by the reasonable and fair application of the doctrine of qualified immunity.

Respectfully submitted,

ALAN E. WISOTSKY
Counsel of Record
JEFFREY HELD
LAW OFFICES OF ALAN E. WISOTSKY
300 Esplanade Drive, Suite 1500
Oxnard, California 93030
(805) 278-0920

GARY L. GILLIG
City Attorney
CITY OF OXNARD
300 West Third Street, Suite 300
Oxnard, California 93030
(805) 385-7483

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 30, 2001

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ, *Plaintiff–Appellee,* v. CITY OF OXNARD; OXNARD POLICE DEPARTMENT; ART LOPEZ, Chief; MARIA PEÑA; ANDREW SALINAS; RON ZAVALA, *Defendants,* and BEN CHAVEZ, *Defendant–Appellant.*	)	Case No. 00-56520 D.C. No. CV-98-09313-FMC OPINION

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Argued and Submitted
June 11, 2001 — Pasadena, California

Filed October 30, 2001

Before: Kim McLane Wardlaw, Richard A. Paez
and Richard C. Tallman, Circuit Judges.

TALLMAN, Circuit Judge:

We must determine whether a police officer who conducts a coercive, custodial interrogation of a suspect who is being treated for life-threatening, police-inflicted gunshot wounds may invoke qualified immunity in a civil suit for damages under 42 U.S.C. §1983 (2001). Under the circumstances of this case, we hold he may not.

I

On November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating narcotics activity near a vacant lot in a residential area of Oxnard, California. While questioning one individual, they heard a bicycle approaching on the darkened path that traversed the lot. Officer Salinas ordered the rider, Oliverio Martinez, to

stop, dismount, spread his legs, and place his hands behind his head. Martinez complied.

During a protective pat-down frisk, Officer Salinas discovered a knife in Mr. Martinez's waistband. Officer Salinas alerted his partner and pulled Martinez's hand from behind his head to apply handcuffs. Officer Salinas claims that Martinez pulled away from him. Martinez alleges that he offered no resistance. Either way, Officer Salinas tackled Martinez and a struggle ensued.

Both officers testified that during the struggle Martinez did not attempt to hit or kick them; Officer Salinas struck the only blow. The officers maintain that Martinez drew Officer Salinas's gun and pointed it at them. Martinez alleges that Officer Salinas began to draw his gun and that Martinez grabbed Officer Salinas's hand to prevent him from doing so.

All parties agree that Officer Salinas cried out, "He's got my gun." Officer Pena drew her weapon and fired several times. One bullet struck Martinez in the face, damaging his optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.

The patrol supervisor, Sergeant Ben Chavez, arrived on the scene minutes later along with paramedics. While Sergeant Chavez discussed the incident with Officer Salinas, the paramedics removed the handcuffs so they could stabilize Martinez's neck and back and loaded him

into the ambulance. Sergeant Chavez rode to the emergency room in the ambulance with Martinez to obtain his version of what had happened.

As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting *Miranda* warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Chavez turned off the tape recorder each time medical personnel removed him from the room. The transcript of the recorded conversation totals about ten minutes and provides an incontrovertible account of the interview.

Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

Martinez filed a complaint under 42 U.S.C. § 1983 alleging that the officer defendants violated his constitutional rights by stopping him without probable

cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care. He moved for summary judgment on each of his claims. The district court denied Sergeant Chavez's defense of qualified immunity and granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment.[1] In this interlocutory appeal, Chavez argues that the district court erred by holding that he was not entitled to qualified immunity.

II

We have jurisdiction over Sergeant Chavez's interlocutory appeal of the purely legal question whether he is entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We review de novo the district court's determination on summary judgment that Chavez cannot invoke qualified immunity as a bar to civil litigation. *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir.2001). For the purposes of this interlocutory appeal, we must accept as true the facts alleged by Martinez and determine whether Chavez is nonetheless entitled to qualified immunity as a matter of law. *Id.* at 866.

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[1]The district court denied summary judgment on Martinez's claims that he was improperly stopped by the police and that they used excessive force against him. Those claims will be tried to a jury.

[1] Section 1983 permits an individual whose federal constitutional or statutory rights have been violated by a public official acting under color of state law to sue the official for damages. Public officials are afforded protection, however, "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity shields them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. 2727. Only conduct that an official could not reasonably have believed was legal under settled law falls outside the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam).

To determine whether Sergeant Chavez is entitled to qualified immunity, we must first determine whether Martinez has stated a *prima facie* claim that Chavez violated one of his constitutional rights. *Saucier v. Katz*, 533 U.S. 194, ____, 121 S.Ct. 2151, 2155, 150 L.Ed.2d 272 (2001). If we determine that Martinez has stated a *prima facie* case, then we must determine whether the right allegedly violated was clearly established by federal law. *Id.* We hold that Chavez violated the Fifth and Fourteenth Amendments by subjecting Martinez to a coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds inflicted by other police officers.

[2] In *Brown v. Mississippi*, 297 U.S. 278, 286, 56 S.Ct. 461, 80 L.Ed. 682 (1936), a unanimous Supreme Court condemned police officers' use of violence to coerce confessions from criminal suspects as "revolting to the sense of justice" embodied in the Constitution. Although the coercive tactics employed by the police in *Brown* involved physical violence, the Court clarified in subsequent opinions that the Fifth and Fourteenth Amendments also proscribe more subtle forms of police coercion. See *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (holding that a confession obtained by refusing to let a suspect contact his wife was coercive and, therefore, unconstitutional); *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (holding that a confession obtained by threatening a suspect with the loss of custody of her children was coercive and, therefore, unconstitutional); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944) (holding that prolonged interrogation without rest or contact with individuals other than law enforcement officers was coercive and, therefore, unconstitutional).[2]

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[2]Each of these cases holds that a coerced confession violates the Fourteenth Amendment and may therefore not be admitted at trial as evidence. None of them establishes a civil remedy for violation of the Fourteenth Amendment. *But see Cooper v. Dupnik*, 963 F.2d 1220, 1244-45 (9th Cir.1992) (en banc), *cert. denied*, 506 U.S. 953, 113 S.Ct. 407, 121 L.Ed.2d 332 (1992). Section

(continued...)

[3] Chief Justice Warren observed in *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), that "coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." A police officer's extraction of a confession is unconstitutional if, "considering the totality of the circumstances, the [officer] obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir.2000) (quotations and citation omitted); *see also Withrow v. Williams*, 507 U.S. 680, 689, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993).

[4] Martinez argues that, considering the totality of the circumstances, Sergeant Chavez's interrogation was coercive and that it therefore violated the Fifth and Fourteenth Amendments. Chavez's coercive, custodial questioning violated the plaintiff's substantive Fifth Amendment right against compulsory self-incrimination. *Cooper*, 963 F.2d at 1235. Under *Cooper*, a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody.

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[2](...continued)
1983 requires only that the right, not the remedy, be established. Indeed, Congress's purpose in enacting §1983 was to create a novel civil remedy for violation of established constitutional rights. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979).

Id. at 1236-37, 1242-44. The plaintiff in that case stated a cause of action under §1983 for violation of his Fifth Amendment right against self-incrimination by alleging that police officers used deception and psychological coercion to extract statements from him. *Id.* at 1242-43. Sitting *en banc*, we hold that the officers' conduct violated the Fifth Amendment even though the plaintiff was never prosecuted, noting that the Fifth Amendment's purpose is to prevent coercive interrogation practices that are "destructive of human dignity." *Id.* at 1239 (quoting *Miranda v. Arizona*, 384 U.S. 436, 457-58 (1966)). We echoed the Supreme Court's holding in *Miranda* that this animating purpose was adequately achieved only if the Fifth Amendment cast its protection against coerced self-incrimination not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked to curtail a criminal suspect's freedom of action in any significant way. *Id.* at 1239.

[5] Here, as in *Cooper*, a police officer's conduct "actively compelled and coerced" a plaintiff to utter statements that the plaintiff could reasonably believe might be used in a criminal prosecution or lead to evidence that might be so used. *Id.* at 1243; *see also Kastigar v. United States*, 406 U.S. 441, 445, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972) (holding that the Fifth Amendment "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used"). Even though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning

violated Martinez's Fifth Amendment rights. *Cooper*, 963 F.2d at 1237; see also *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1047-49 (9th Cir. 2000) (holding that *Miranda* and its progeny establish clearly and unequivocally that coercive, custodial interrogation violates the Fifth Amendment).[3] We affirm the district court's holding that Officer Chavez cannot invoke qualified immunity as a defense to Martinez's Fifth Amendment claims.

[6] Likewise, a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial.

> The due process violation caused by coercive behavior of law-enforcement

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[3]We recognize the existence of Supreme Court dicta to the contrary. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."). Where the two are at odds, however, we are bound to follow our own binding precedent rather than Supreme Court dicta. *See Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir.1977) (holding that Supreme Court dicta is not binding).

> officers in pursuit of a confession is *complete with the coercive behavior itself.... The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.*

Cooper v. Dupnik, 963 F.2d at 1244-45 (emphasis added). Mr. Martinez has thus stated a *prima facie* case that Sergeant Chavez violated his Fifth and Fourteenth Amendment rights to be free from police coercion in pursuit of a confession.

[7] We must now determine whether the rights that Martinez alleges Chavez violated were clearly established by federal law.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (internal citations omitted). We must determine, in other words, whether a reasonable officer in Sergeant Chavez's position would have known that his conduct violated Martinez's Fifth and Fourteenth

Amendment rights to be free from coercive interrogation. Because "whether [a] confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances," *Haynes*, 373 U.S. at 513, 83 S.Ct. 1336, our holding will necessarily be a narrow one confined to the specific facts of this case. Nor do we opine on the appropriate measure of damages for such a violation; that is for the jury to decide. *See Cooper*, 963 F.2d at 1245 ("[T]he fact that [the suspect] never formally was charged in court and none of his statements ever were offered in evidence to his potential detriment is relevant only to damages, not to whether he has a civil cause of action in the first place.").

[8] The record before us reveals that Sergeant Chavez doggedly pursued a statement by Martinez despite being asked to leave the emergency room several times. He ignored Martinez's pleas to withhold questioning until he had received medical treatment. A reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received *Miranda* warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation.

The Supreme Court held a virtually indistinguishable interrogation unconstitutional in *Mincey v. Arizona*:

> [The officer] ceased the interrogation only during intervals when [the suspect] lost consciousness or received medical treatment, and after each such interruption returned relentlessly to his task. The statements at issue were thus the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness.

437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *but cf. United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir.1993) (holding that interrogation in the hospital of a coherent suspect who has received *Miranda* warnings is not unconstitutional); *United States v. Lewis*, 833 F.2d 1380, 1384 (9th Cir.1987) (holding voluntary a statement elicited from a suspect just after she returned from surgery and emerged from the effects of general anesthetic where the suspect was alert, responsive, and unresisting).

To the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious. Sergeant Chavez did not read Martinez his *Miranda* warnings. *See Davis v. North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) ("[T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation ... is a significant factor in considering the voluntariness of statements later made."); *Miranda*, 384 U.S. at 467, 86 S.Ct. 1602 ("[W]ithout proper safeguards the process of in-custody interrogation ... contains inherently compelling pressures which work to undermine the individual's will to

resist and to compel him to speak where he would not otherwise do so freely."). Chavez persisted in questioning Martinez during, not after, medical treatment. Although Martinez did not, like Mincey, affirmatively request counsel, he repeatedly requested that Sergeant Chavez refrain from interviewing him until his medical treatment was complete and his life was no longer in danger.

[9] In light of the extreme circumstances in this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments. Accordingly, the district court did not err by holding that on these facts qualified immunity was not available to Chavez to insulate him from Martinez's civil rights suit for damages.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION FILED AUGUST 1, 2000

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

OLIVERIO MARTINEZ,	)	CV 98-9313 FMC (AJWx)
	)	
Plaintiff,	)	
	)	**ORDER GRANTING**
vs.	)	**IN PART AND**
	)	**DENYING IN PART**
CITY OF OXNARD, et al.,	)	**PLAINTIFF'S**
	)	**MOTION FOR**
Defendants.	)	**SUMMARY**
	)	**ADJUDICATION**
	)	

I. Introduction

Plaintiff filed a complaint under 42 U.S.C. §1983 alleging that the individual officer defendants violated his constitutional rights by stopping him without probable

cause, using excessive force and interrogating him while he was receiving medical care. Plaintiff's complaint also alleged that: the City failed to train the officers, the individual officers acted pursuant to a policy or custom of the City of Oxnard, defendants battered plaintiff and defendants acted negligently. These claims, enumerated as plaintiff's second, third, fourth, and fifth claims for relief, as well as all claims against defendants Lopez and Hurtt, were dismissed by stipulation. Plaintiff moved for summary adjudication on his remaining claims for damages against the individual officers under §1983.

Plaintiff's motion does not comply with several of the requirements of the Local Rules of the Central District of California. Most importantly, plaintiff's counsel did not comply with Local Rule 7.4.1's requirement that twenty days before filing a noticed motion, "counsel contemplating the filing of any motion shall contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion." Plaintiff's counsel's letter, mailed twenty-one days before the motion was filed presented no opportunity for counsel to "discuss thoroughly" the contemplated motion. In addition, plaintiff's papers do not conform to the typeface size requirements of Local Rule 3.4.1. Failure to comply with the important procedural requirements of the local rules may result in denial of the motion or monetary sanctions. *See* Local Rule 27. Although plaintiff's motion is procedurally defective, in the interest of judicial economy, the Court issues the following decision:

II. Standard for Summary Adjudication

Plaintiff's motion for summary adjudication seeks rulings from the Court on several issues: that the questioning of plaintiff by Chavez violated plaintiff's Fifth and Fourteenth Amendment rights; that plaintiff's statements in the hospital are untrustworthy because plaintiff was not competent; that Chavez violated plaintiff's Eighth Amendment rights by interrogating him at the hospital; and that plaintiff's stop and detention violated his Fourth Amendment rights. Defendants correctly point out that plaintiff cannot seek adjudication of "issues" under Federal Rule of Civil Procedure 56. Instead, partial summary judgment or summary adjudication is available only for an entire "claim." Accordingly, the Court treats the motion as one for summary adjudication of defendants' liability for plaintiff's §1983 claims for violations of the Fourth, Fifth, Eighth and Fourteenth Amendments.

Summary adjudication is only proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, snhow that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(b); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 586-87 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

III. Factual Background

Plaintiff alleges that: he was riding his bicycle home at approximately 7:00 p.m. on November 28, 1997, when defendant officers Peña and Salinas stopped him without probable cause; although plaintiff complied with Salinas' orders, Salinas jumped on top of him after conducting a pat down search; although plaintiff was wearing the knife he used for work at the time, he did not attempt to remove it from its sheath; while plaintiff and Salinas were struggling on the ground, Peña approached and shot plaintiff in the temple, the abdomen and the knee.

Defendants contend that: while investigating reports of drug activity, Peña and Salinas saw plaintiff approach on his bicycle; because they believed the area he was riding in was an enclosed field, they asked plaintiff to stop so they could ask him about the reported drug activity; Salinas ordered plaintiff to get off of his bicycle and put his hands behind his head and Plaintiff complied; Salinas performed a pat down search and discovered plaintiff's knife; Salinas contends that plaintiff made a "furtive" movement toward the knife which he countered by forcing plaintiff to the ground; as the two struggled, Peña approached; during the struggle, plaintiff removed Salinas' gun from its holster and began pointing it at both defendants; Peña shot plaintiff in response.

Parties agree that the following occurred: Peña shot plaintiff; plaintiff was taken to the hospital; while plaintiff was being treated and prepared for surgery, Officer Chavez questioned plaintiff; and plaintiff stated to Chavez that he

grabbed Salinas' gun. Plaintiff was not charged with a crime as a result of the incident.

IV. Plaintiff's Constitutional Claims

A. Questioning of Plaintiff at the Hospital

As noted above, there is no dispute that Chavez questioned plaintiff at the hospital. Plaintiff contends that Chavez violated plaintiff's Fifth and Fourteenth Amendment rights when Chavez extracted from him a statement that was a product of coercion.

1. Voluntariness of Plaintiff's Statement to Chavez

In determining the voluntariness of a confession, the Court must determine "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991). A statement is involuntary if it is extracted by threats or violence or the exertion of any improper influence. *See United States v. Bautista-Avila*, 6 F.3d 1360, 1364 (9th Cir. 1993). "The test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990). The question of whether a confession is voluntary is a matter of law. *See United States v. D.F.*, 115 F.3d 413, 418 (7th Cir. 1997).

A statement may be found involuntary, even if made when the party was not in custody. *See U.S. v. Eccles*, 850 F.2d 1357, 1361 n.2 (9th Cir. 1988). The requirement that statements, to be admissible, must be voluntary, is based on both the right against self-incrimination and the standards of due process. *See Oregon v. Elstad*, 470 U.S. 298, 304 (1985). Involuntary statements are inherently untrustworthy, and their use violates our fundamental sense of decency. *See Spano v. New York*, 360 U.S. 315, 320 (1959). Therefore, a statement found to be involuntary may be excluded from both criminal and civil proceedings. *See Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (an involuntary confession is inadmissible in part because such a confession is likely to be unreliable); Federal Rule of Evidence 403.

In examining the totality of the circumstances, the Court considers many factors to evaluate voluntariness: whether the police engaged in overreaching; whether the accused was under the influence of pain medication; the general mental status of the accused at the time the statement was given; whether questioning was intense and lengthy, particularly if an accused has been deprived of food or sleep; and the presence or absence of counsel, defendant's awareness of the charges he was facing, and whether he had been advised of his right to counsel. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (overreaching); *Beecher v. Alabama*, 408 U.S. 234, 237 (1972) (under the influence of pain medication); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960) (mental status);

Reck v. Pate, 367 U.S. 433, 441 (1961) (length of questioning); 18 U.S.C. §3501 (listing considerations).

The evidence establishes that plaintiff had been shot at least four times, one of the bullets having penetrated his head. The other bullets entered his chest, abdomen and spinal area, and knee. During the questioning at the hospital, plaintiff repeatedly begged for treatment; he told the officer he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more.[1] According to the police follow-up report, plaintiff was yelling in pain and was in and out of consciousness. Chavez acknowledged at his deposition that at the time of the questioning, plaintiff "was not doing too good." Officer Chavez also testified that although plaintiff told him at the hospital he did not want to talk to him, the officer continued to ask him questions and did not advise him of his *Miranda* rights.

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[1]The Declaration of Officer Chavez, submitted in Opposition to this Motion, contains the following statement concerning the interview at the hospital: "He never refused to respond to my questions until the end of the interview, at which time I stopped the interview." (McCormick Dec., Ex. F, ¶8.) The transcript of the interview reflects that on two occasions during the interview, plaintiff told the officer he did not want to say anything further, but the questioning continued. (McCormick Dec., Ex. I, at 6, 11.) The Declaration does not create a triable issue of fact.

Certainly, not every interrogation of a wounded suspect in a hospital bed is coercive.[2] However, the totality of the circumstances in this case convinces the Court that plaintiff's statement was not voluntarily given. He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk.

The facts of this case are remarkably similar to those in *Mincey v. Arizona*, 437 U.S. 385 (1978). The *Mincey* Court described the circumstances under which the defendant had given his statement.

> He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. He complained to Hust that the pain in his leg

[2]Otherwise proper interrogation techniques can produce an involuntary confession where, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." (*Miller v. Fenton*, 474 U.S. 104, 110 (1985).)

> was "unbearable." . . . Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation.

Id. at 398 (footnote omitted). The Supreme Court concluded: "It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will.'" *Id.*

The Court holds, as a matter of law, that plaintiff's statement was coerced in clear violation of his constitutional rights. Accordingly, plaintiff is entitled to summary adjudication of his claims for violations of the Fifth and Fourteenth Amendments. Moreover, because the statement was obtained in violation of the Constitution, it is not admissible at the trial of this case.

2. Claim for Violation of the Eighth Amendment

Plaintiff contends that Chavez's questioning of plaintiff violated his Eighth Amendment right in two ways: by being "deliberately indifferent" to his medical needs and by inflicting "cruel and unusual" punishment. Although plaintiff asserts an Eighth Amendment violation, it is clear that because plaintiff was not a convicted inmate at the time, the Eighth Amendment is inapplicable.

Instead, because plaintiff contends he was detained, these claims are properly viewed as a claim for violation of

the Due Process clause of the Fourteenth Amendment. *See Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991) ("the due Process clause protects a pretrial detainee from the use of excessive force that amounts to punishment"). It is clear that deliberate indifference to a detainee's medical needs may rise to the level of a Fourteenth Amendment violation. *See id.* at 1443.

However, because there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment, plaintiff is not entitled to summary adjudication of his claim for violation of the Eighth Amendment.

B. Plaintiff's Stop and Detention

Plaintiff contends that his stop and detention vithout a warrant violated his Fourth Amendment rights. Defendants contend that they had "reasonable suspicion" of illegal narcotics activity in the area and that plaintiff had information about that activity based on his presence in an enclosed area.[3] Moreover, they contend that plaintiff voluntarily consented to the search.

Law enforcement officers may detain a person for the purpose of investigating possible criminal behavior where "reasonable suspicion" of a crime exists. Reasonable suspicion exists when officers are aware of

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[3]It is undisputed that the area was not enclosed although defendants were unaware of that fact at the time they stopped plaintiff.

facts which, taken together with rational inferences from those facts, lead a reasonable person to believe that the person stopped has been, is, or is about to be engaged in criminal activity. *See United States v. Thomas*, 211 F.3d 1186, 1189 (9th Cir. 2000). In general, whether reasonable suspicion existed is a question for the jury. *See McKenzie v. Lamb*, 738 F.2d 1005, 1008 (9th Cir. 1984). Accordingly, "summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have [reasonable suspicion]." *Id.*

The Court cannot conclude that no reasonable jury could find that Peña and Salinas did not have reasonable suspicion sufficient to stop plaintiff. Peña's first-hand knowledge of drug paraphernalia at the site, the report from the neighbors of drug activity, and defendants' mistaken belief that the field was enclosed, create a genuine issue of fact as to whether the defendants had reasonable suspicion to stop plaintiff. Because a genuine issue of material fact exists, plaintiff is not entitled to summary adjudication of his claim for violation of the Fourth Amendment.

V. Qualified Immunity

At the hearing on plaintiff's motion, defendants moved for summary adjudication of the issue of qualified immunity for Chavez's interview of plaintiff, which as explained above, violated the Constitution. Because neither party addressed the issue in briefing on plaintiff's motion for summary adjudication, the Court ordered supplemental briefing on the issue. After reviewing the

parties' submissions, the Court issues the following decision:

Public officials exercising discretionary authority are entitled to qualified immunity from suit where their actions "[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In determining whether defendants are entitled to qualified immunity, the Court must consider (1) whether the plaintiffs have identified a specific federal statutory or constitutional right that has been allegedly violated, (2) whether that right was so clearly established as to alert a reasonable official to its parameters, and (3) whether a reasonable official could have believed his or her conduct was lawful. *See Sweany v. Ada County, Idaho*, 119 F.3d 1385, 1388 (9th Cir. 1997).

Plaintiff points to *Miranda v. Arizona*, 384 U.S. 436 (1996), and *Miller v. Fenton*, 474 U.S. 104 (1985) to support his argument that the contours of the Fifth Amendment right to *Miranda* warnings and Fourteenth Amendment bar against involuntary confessions were sufficiently defined at the time of his questioning by Chavez. Defendants agree that:

> leading coercive custody decisions [forbid]: examination after request for counsel; examination after expression of a prompt, unequivocal intent not to speak; multi-hour examination; multi-officer presence in a police dominated environment; strong-arm tactics, such as conjured fears, deprivations, berating; and knowing attempts to abridge the right against self-incrimination to extract self-inculpatory data or leads.

(Def's Memo. 20:20-24.) In this case, many of the forbidden practices delineated by defendants were engaged in by Chavez during the interview.

Defendants argue that plaintiff never told Chavez to leave or requested to be left alone. However, on several occasions plaintiff told Chavez "I am not telling you anything until they treat me," and "I don't want to say anything anymore." (Mercado Dec., Ex. 2, p. 6, 11.) These statements clearly communicate plaintiff's "intent not to speak." Plaintiff's requests, made among many other pleas for treatment, are sufficient to put a reasonable officer on notice that plaintiff was not speaking voluntarily.

Defendants argue that a reasonable officer might have thought a "ten-minute, seven-second examination" did not violate the Constitution. Although plaintiff's answers to Chavez's questions may have produced only ten minutes of tape recording, it is undisputed that the interview was conducted intermittently for approximately 45 minutes. (McCormick Dec., Ex. F. Chavez Dec., 126:12-13.) In light of the fact that plaintiff was suffering excruciating pain and being prepared for emergency surgery, forty-five minutes is an excessively lengthy interview. The fact that Chavez returned to continue questioning plaintiff after being repeatedly ushered out of

the room by medical personnel exacerbates the coercive nature of the interview.

Defendants contend that because Chavez did not use strong-arm tactics such as physical violence or coercive threats to elicit the statement, he is entitled to qualified immunity. It is true that Chavez did not inflict pain on plaintiff. The bullets fired from another officer's gun into plaintiff's head, abdomen and knee had inflicted ample pain to overcome plaintiff's will. The Court cannot image what Chavez or any other officer could do in an interrogation room that would cause additional pain to one who is blind because of a gunshot wound to the head and paralyzed from another to his abdomen. Moreover, Chavez repeatedly told plaintiff he was dying. Although plaintiff also stated that he thought he was dying, reinforcement of this fear from a police officer is psychologically coercive.

Finally, defendants argue that Chavez was not attempting to abridge the right against self-incrimination to extract self-inculpatory data or leads:

> There was no point in Sgt. Chavez's trying to build a criminal case against a man who was about to expire; plainly, there would have been no one to prosecute. Even if he had survived, as he in fact did, no prosecutor would bring charges against a person who had not succeeded in injuring

> the officers in any way and had himself been gravely disabled.

(Def's Memo. 12:3-7.) At the time Chavez was interviewing plaintiff, he had no knowledge of whether or not a prosecutor would charge plaintiff if he survived. Moreover, the Court has no statement from Chavez that he did not believe plaintiff would ever be charged. Defendants' argument is speculative hindsight. At the time he questioned plaintiff, Chavez believed that plaintiff had attempted to shoot two police officers — a serious crime indeed. Whatever decision would be reached later about prosecution, the Court cannot conclude that Chavez would not have investigated thoroughly this serious crime.

Moreover, because this was an officer-involved shooting, Chavez was clearly trying to obtain information that could clear the officers of wrong-doing. Although this information is not protected by the Fifth Amendment, Chavez's motivation was certainly not to assist plaintiff.

The law against coerced confessions was clearly established at the time of plaintiff's interview. The Court concludes that no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible. Moreover, plaintiff, on several occasions, told Chavez that he did not want to talk; that he wanted to be treated. Given the circumstances of plaintiff's interview and established constitutional boundaries, the Court concludes that Chavez is not entitled to qualified immunity.

VI. Conclusion

Plaintiff's motion for summary adjudication, filed June 5, 2000, is granted in part and denied in part. Plaintiff is entitled to summary adjudication of his §1983 claims for violation of the Fifth and Fourteenth Amendment based on his questioning while in the hospital. Chavez is not entitled to qualified immunity for interviewing plaintiff at the hospital.

IT IS SO ORDERED. /s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, JUDGE
July 31, 2000 UNITED STATES DISTRICT COURT

APPENDIX C— ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING FILED DECEMBER 26, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ, Plaintiff – Appellee, v. CITY OF OXNARD; OXNARD POLICE DEPARTMENT; ART LOPEZ, Chief; MARIA PEÑA; ANDREW SALINAS; RON ZAVALA, Defendants, and	)	Case No. 00-56520 D.C. No. CV-98-09313-FMC (Central Dist. Calif.) ORDER

BEN CHAVEZ,

Defendant – Appellant.

Before: WARDLAW, PAEZ and TALLMAN, Circuit Judges.

The panel has voted to deny the Petition for Rehearing and Suggestion for Rehearing En Banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to hear the matter en banc. Fed. R. App. 35(b).

The Petition for Rehearing En Banc and Suggestion for Rehearing En Banc is DENIED.

No. 01-1444

Supreme Court, U.S.
FILED
MAY - 2 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. SAMUEL PAZ
(*Counsel of Record*)
LAW OFFICES OF
R. SAMUEL PAZ
Biltmore Court –
7th Floor
520 S. Grand Avenue
Los Angeles, California
90071
(310) 410-2981

SONIA MERCADO
SONIA MERCADO & ASSOCIATES
Biltmore Court –
7th Floor
520 S. Grand Avenue
Los Angeles, California
90071
Telephone: (213) 683-5313
Co-counsel for Respondent

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should grant this petition for certiorari where Petitioner's argument depends upon the interpretation of facts that were rejected by the District Court and the Ninth Circuit.

2. Whether this Court should review the decision of the Court below to decide whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights, where the facts in the case established that the defendant officer engaged in coercive questioning of the plaintiff that violated his rights irrespective of whether he had received the Miranda warnings.

3. Whether this Court should review the decision of the Court below to decide whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights, where the plaintiff in any event asserted his right to decline to answer questions and the defendant officer intentionally violated his rights by questioning him notwithstanding respondent's assertion of his right to remain silent.

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CONSTITUTIONAL PROVISIONS MISSTATED OR OMITTED BY THE PETITIONER

In accord with Supreme Court Rule 15.2, Respondent sets forth the omission by the Petitioner of the due process clause of the Fourteenth Amendment. This provisions of law bears on issues that should be considered, if properly before this court, should certiorari were granted:

> 1. No state . . . shall be deprived any person of life, liberty, or property, without due process of law. . . .

U.S. Const., amendment XIV.

STATEMENT OF THE CASE AND PROCEDURAL STATUS

Plaintiff, Oliverio Martinez, age 32 years, is a long-time resident of Oxnard, Ventura, California. Plaintiff filed a complaint under 42 U.S.C. § 1983 alleging that on November 28, 1997, the individual officers violated his constitutional rights by stopping him without probable cause, using excessive force during the arrest, interrogating him in violation of constitutional standards and denial of medical care. The undisputed facts summarized below are set forth in more detail by the District Court's Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment. Pet. App. 15a-23a.

On June 5, 2000, Plaintiff moved for summary adjudication *inter alia* that: (1) that the questioning of Respondent by Petitioner violated Martinez's Fifth and Fourteenth Amendment rights; (2) that the statements of

Martinez in response to the interrogation by Petitioner were untrustworthy as Martinez was not mentally competent to make a voluntary statement under the Fourteenth Amendment.[1]

On August 1, 2000, the District court granted summary adjudication of Plaintiff's claims finding that (1) the questioning violated the Plaintiff's Fifth and Fourteenth Amendment rights; (2) that the statements were untrustworthy under the Fourteenth Amendment; and (3) denying CHAVEZ qualified immunity.

The Ninth Circuit opinion affirmed the denial of qualified immunity based on the uncontradicted facts above, concluding (in part) that "a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments." Pet. App. 14a

CHAVEZ'S Petition for Rehearing and Suggestion for Rehearing En Banc was denied after the full court had been advised "and no active judge has requested a vote on whether to hear the matter en banc." Pet. App. 32a. This Writ of Certiorari was docketed on April 3, 2002, and Respondent now files this Opposition.

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[1] A Fourth Amendment claim for arrest without probable cause and an Eighth and Fourteenth Amendment claim for denial of medical attention were also considered and denied.

REASONS FOR DENYING THE WRIT

I. THE FACTS ARGUED IN THE PETITION ARE INCORRECT, ARE NOT SUPPORTED BY THE RECORD AND HAVE BEEN REJECTED BY THE DISTRICT COURT AND THE NINTH CIRCUIT

In accord with Supreme Court Rule 15.2, Respondent sets forth the misstatements of fact proffered by the Petitioner.

A. The Length of Time of The Interrogation

CHAVEZ'S version of facts that "the interview was only 10 minutes and 7 seconds" (Pet. 3 and 7) was rejected by the District Court:

> Defendants argue that a reasonable officer might have thought a "ten-minute, seven-second examination" did not violate the Constitution. Although plaintiff's answers to Chavez's questions may be produced only ten minutes of tape recording, **it is undisputed that the interview was conducted intermittently for approximately 45 minutes.** (McCormick Dec., Ex. F., Chavez Dec., 126:12-13.)[2] In light of the fact that

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[2] In finding this evidence undisputed the district court relied upon the declarations of the Petitioner and his lawyer. "McCormick" is Kevin McCormick, who, at the time, was co-counsel with Alan E. Wisotsky of the Law Office of Alan E. Wisotsky, the Petitioner's attorney. "Chavez" is the Petitioner. At page 271:12-20, of the Record on Appeal, CHAVEZ declared: "I determined that I was with Mr. Martinez in the emergency room for approximately 45 minutes. . . . I was present with Mr. Martinez between the time he arrived at the hospital and the CT study being performed."

> plaintiff was suffering excruciating pain and being prepared for emergency surgery, forty-five minutes is an excessively lengthy interview. The fact that Chavez returned to continue questioning plaintiff after being repeatedly ushered out of the room by medical personnel exacerbates the coercive nature of the interview. Pet. App. 27a, emphasis added.

Thus, this version of the facts now urged by CHAVEZ in his petition are opposite to the facts CHAVEZ and his counsel offered in opposition to plaintiff's motion for summary judgment and this Court should reject these newly proffered "facts."

Contrary to the Petitioner's assertion, the Circuit opinion also found that the interview lasted 45 minutes:

> As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting Miranda warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Pet. App. 4a.

B. Martinez's Assertion of His Fifth Amendment Right to Remain Silent

1. Respondent Martinez Twice Asked Not to Be Interrogated

CHAVEZ misleads the court to believe that Martinez failed to assert his right to remain silent by arguing that Martinez's failure to "ask for a lawyer," is a waiver of his Fifth Amendment rights. Pet. 12-13. The District Court

rejected this version of the facts because asking for a lawyer is not the only method of invoking the right to remain silent.

> Defendants argue that plaintiff never told Chavez to leave or requested to be left alone. However, on several occasions plaintiff told Chavez "I am not telling you anything until they treat me, and I don't want to say anything more." (Mercado Dec., Ex. 2, p. 6, 11.) These statements clearly communicate plaintiff's "intent not to speak." Plaintiff's requests, made among many other pleas for treatment, are sufficient to put a reasonable officer on notice that plaintiff was not speaking voluntarily. Pet. App. 27a.

2. Petitioner's Declaration Conflicts with His Tape Recording of The Interrogation

In rejecting CHAVEZ's proffered evidence, the district court pointed out (Pet. App. 21a, fn. 1) that Petitioner's declaration submitted in support of qualified immunity conflicted with Petitioner's tape recorded interview on the issue that MARTINEZ had twice told CHAVEZ that he did not want to talk but that CHAVEZ persevered.

> The Declaration of Officer Chavez, submitted in Opposition to this Motion, contains the following statement concerning the interview at the hospital. "**He never refused to respond to my questions** until the end of the interview, at which time I stopped the interview." (McCormick Dec., Ex. F ¶8.) The transcript of the interview reflects that **on two occasions during the**

> **interview, plaintiff told the officer he did not want to say anything further, but the questioning continued**. (McCormick Dec., Ex. I, at 6, 11.) The Declaration does not create a triable issue of fact. Pet. App. 21a, fn 1, emphasis added.

C. Martinez's Condition at The Time of The Interrogation

The District Court and the Ninth Circuit found the facts in *Mincey v. Arizona*, 437 U.S. 385 (1974), analogous to this matter. In attempting to distinguish the facts of *Mincey*, Petitioner argues facts that were never supported by the record: "In contrast, **the respondent was lucid throughout the interview and never expressed any hallucinations or statements indicating that he was confused or unable to think clearly**; his responses made sense." Pet. 16., emphasis added.

The District Court rejected those facts and found the facts to be quite different:

> However, the totality of the circumstances in this case convinces the Court that plaintiff's statements was (sic) not voluntarily given. He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details for the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk. Pet. App. 22a.

In rejecting Petitioner's twist of the facts, the Ninth Circuit found the condition of the Respondent based on

CHAVEZ'S taped interview and his deposition testimony be as follows:

> Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "during the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more."

In summary, CHAVEZ requests this Court to review and find erroneous the factual determinations below. This Court should not decide to review the undisputed facts upon which summary judgment was granted and qualified immunity denied.

II. THE ACTIONS OF THE PETITIONER VIOLATED THE CONSTITUTIONAL RIGHTS OF THE RESPONDENT TO REMAIN SILENT AND CONSTITUTED THE UNCONSTITUTIONAL COERCION OF STATEMENTS FROM HIM

Petitioner essentially argues that this is only a Fifth Amendment case based on the failure to give *Miranda* admonitions. This argument disingenuously misstates the central issue of the holdings below that CHAVEZ'S coercive conduct and effort to have Martinez incriminate himself is a core violation of the Fifth and Fourteenth

Amendments and contrary to the very policies the privilege against self-incrimination was designed to protect.[3]

This Court has held that compelling a person to speak and to make statements against himself after he has asserted his right not to speak violates his constitutional rights under the Fifth and Fourteenth Amendments, whether or not he has received Miranda warnings and whether or not his statements are subsequently used against him in a criminal trial. The Court has made clear that the government may not assess a penalty against a person for asserting his Fifth Amendment right not to answer questions. Imposition of such a penalty "foreclos[es] a free choice to remain silent, and . . . compe[ls] . . . incriminating testimony." *Garner v. United States*, 424 U.S. 648, 661 (1976). Hence, in *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) the Court has held that the government may not constitutionally impose such penalties:

> In each of the so-called 'penalty' cases, the state not only compelled an individual to appear and testify, but also sought to induce him to forego the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the

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[3] See *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964): (" . . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play . . . our respect for the inviolability of the human personality. . . . ") *Id.*, cites omitted

> Amendment forbids.' Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977). In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the Court ruled that the state could not constitutionally make good on its prior threat. Lefkowitz v. Turley, 414 U.S., at 79-84; Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280, 283-284 (1968); Gardner v. Broderick, 392 U.S. 273, 278-279 (1968). These cases make clear that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself. Lefkowitz v. Cunningham, supra, 431 U.S. at 805.

A. Early Cases Rejected The Contention That The Fifth Amendment Is Violated Only If and When The Statement Is Introduced in a Criminal Trial

There are many situations in which the Fifth Amendment may properly be asserted and in which coercing a person to talk over his invocation of the privilege would violate the Fifth Amendment at the time of the coercion. For example, if a witness asserts the privilege against self-incrimination at a grand jury proceeding, he may not be compelled to answer questions which might incriminate him unless he is afforded immunity. In *Counselman v. Hitchcock*, 142 U.S. 547 (1892), the Court held that the right prohibiting compelled statements was not limited to criminal trials:

> It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence, except in a criminal case

against himself; but such is not the language of the constitution. Its provision is that no person shall be compelled in any criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. . . . It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. *Id.*, 562.

This broader interpretation of the reach of the Fifth Amendment has been consistently upheld.[4]

B. Recent Cases Also Reject The Contention That The Fifth Amendment Is Violated Only If and When The Statement Is Introduced in a Criminal Trial

More recently the Court held unconstitutional a state statute which would have compelled architects to testify

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[4] See, e.g., *United States v. North*, 287 U.S. App. D.C. 146, 920 F.2d 940, 948 (D.C. Cir. 1990) (per curiam) ("We believe – as do five of our sister circuits . . . – that grand jury consideration of evidence already unconstitutionally compelled . . . such as where Miranda warnings are not given, the constitutional violation occurs independent of the grand jury."), *cert. denied*, 114 L. Ed. 2d 477, 111 S. Ct. 2235 (1991).

despite an assertion of Fifth Amendment rights, by denying them government contracts unless they waived any claim of immunity from prosecution based upon their answers. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

Similarly, this Court has held that a bankrupt petitioner may not be held in contempt and imprisoned for failing to file a schedule of his assets, where he has asserted his Fifth Amendment privilege in declining to file on the ground that the information could incriminate him. *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (affirming release from custody on writ of habeas corpus). The Court explained:

> The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. 266 U.S. at 42.

In the context of an administratively compelled statement involving, e.g., police officers, the violation of the Fifth Amendment occurs if the officer is forced to give a statement at the threat of losing his/her job when the same statement can also be used for criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493 (1967) and *Gardner v. Broderick*, 392 U.S. 273 (1968)

These cases and others make clear that the narrow reading of the Fifth Amendment urged by the Petitioner

is without support. It is clear that a witness in a civil deposition could not be compelled by a court order to answer questions despite an assertion of the Fifth Amendment privilege. Equally so, a witness who is compelled to testify before a congressional, senatorial or other legislative investigative body may not be forced to testify over the invocation of Fifth Amendment's protections.[5]

C. The Two Facets of the Fifth Amendment Extends its Protections Beyond Introduction of a Coerced Statement in a Criminal Case

As demonstrated above, the Fifth Amendment privilege against compulsory self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. To fulfill its purposes the constitutional privilege against self-incrimination has two primary interrelated facets: (1) the Government may not use compulsion to elicit self-incriminating statements; and, (2) the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 57 fn. 6 (1964).

The argument advanced by the Petitioner ignores the first facet – the prohibition against compulsion – by limiting the scope of the constitutional right to the second

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[5] (See, e.g., *Garrity v. New Jersey*, 385 U.S. 493 (1967) (upholding invocation of privilege in state investigation) and *Murphy v. Waterfront Commission of New York Harbor, supra* (upholding privilege in hearings before a federally approved bi-state regulatory body.)

facet – the exclusionary rule and the use of a compelled statement in a criminal trial. This faulty argument implies that egregious and blatant violations of the privilege against self-incrimination by coercive tactics or interrogations could never be actionable as a violation of due process "unless and only" if it was introduced into a criminal trial.

Not only is this not the law, such a rule would invite intentional and malicious violations if an unscrupulous interrogator knew that coercion was not actionable because the statements would never result in a criminal prosecution, or if it did, the interrogation and coerced responses would not be introduced.

In the case of a person in police custody, this Court has recognized that there is coercion inherent in the custodial situation. As this Court has noted, "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. at 433.

In the present case, of course, the officer did not merely insinuate that interrogation would continue until a confession was obtained, he in fact continued to interrogate, despite respondent's expressed assertion of his right not to answer questions and his perilous medical condition. That this violated his Fifth and Fourteenth Amendment rights under the cases cited above may not seriously be questioned.

There are a number of other circuit civil cases holding that coercing statements constitutes a constitutional violation at the time of the coercive conduct, whether or

not such statements are subsequently introduced into evidence at a criminal trial.[6]

III. THE PETITIONER MISSTATES THAT *MARTINEZ V. CITY OF OXNARD* CONFLICTS WITH A DECISION OF THIS COURT AND OF A CIRCUIT COURT.

Petitioner asserts as a basis for seeking certiorari that the **holdings** of *United States v. Verdugo Urquidez*, 494 U.S.

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[6] *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (holding force used in an attempt to coerce an incriminating statement stated a § 1983 claim for violations of the Fifth and Fourteenth Amendments); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992) (*en banc*) ("It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's wrongdoing was complete at the moment it forced Cooper to speak."); *Griffin v. Strong*, 983 F.2d 1540 (10th Cir. 1993) (upholding a § 1983 action based on a coerced confession was presented by the facts as a matter of law); *Weaver v. Brennan*, 40 F.3d 527 (2nd Cir. 1994) (coerced statement creates a claim under § 1983 although not introduced into criminal trial.); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) (upholding § 1983 claim and denying qualified immunity for defendant who coerced a witness and used coerced statement in warrant to arrest plaintiff although statement never introduced into criminal case.) *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (intentional questioning after invocation of 5th Amendment rights constitutes a claim under § 1983 although statements not introduced into criminal trial.) *Guerra v. Collins*, 916 F. Supp. 620, 626-627 (S.D. Tex.1995), *aff'd on other grounds*, 90 F.3d 1075 (5th Cir. 1996) (holding intimidation of youthful witnesses who spoke poor English leading to false damaging statements violated due process); *Wilson v. City of Chicago*, 707 F. Supp. 379 (N.D. Ill. 1991) (coerced confession actionable even if state criminal proceeding results in an exclusion of the statements).

259 (1990) and *Mahoney v. Kersey*, 976 F.2d 1054 (7th Cir. 1992) conflict with the circuit's decision below. Petitioner misstates the holdings of both cases and fails to establish any of the reasons for granting the writ set forth in Supreme Court Rule 10(a), (b) or (c)

Neither case conflicts with *Martinez*. In summary, the holding in *Verdugo Urquidez* was that the Fourth Amendment did not extend to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The holding in *Mahoney v. Kersey* was that there was no qualified immunity for a false arrest and that the defendant waived objections to plaintiff's theory that malicious prosecution constitutes a constitutional violation for § 1983.

Neither case is based on a coerced statement nor the Fifth Amendment, nor the Fifth and Fourteenth Amendments. In both cases the comments cited by Petitioner are dicta and not the holding of the case.

A. Facts and Holding of *Verdugo Urquidez*

In *Verdugo Urquidez* the Government obtained an arrest warrant for Verdugo Urquidez – a Mexican citizen and resident believed to be a leader of an organization that smuggles narcotics into this country – he was apprehended by Mexican police and transported to the U.S. where he was arrested by federal police. Following his arrest, Drug Enforcement Administration (DEA) agents, working in cooperation with Mexican officials, without a warrant, searched his Mexican residences and seized certain documents. The District Court granted the criminal

defendant's motion to suppress the evidence. The Court of Appeals affirmed. The Supreme Court defined the issue to be decided was "The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." (*Id.*, 261.)

The holding of that case was limited solely to the facts of the search in Mexico, the Fourth Amendment and the rights of aliens. It was stated as follows:

> We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. (*Id.*, 274-275.)

The Court in *Verdugo* discussed excluding the possibility that the defendant's Fourth Amendment rights were violated not only by an illegal search, but also by introduction of the evidence at trial. The Court concluded that the exclusionary rule, which bars illegal seized evidence from trial, is "a remedial question separate from the existence vel non of the constitutional violation." 494 U.S. at 264. Thus the Court concluded, "if there were a constitutional violation, it occurred solely in Mexico." *Id.*

The Court, for the sake of illustration, contrasted the Fourth Amendment with the Fifth Amendment, where there is clearly a violation at trial if a coerced statement is

introduced in evidence. The Court had no occasion to consider, even for the purpose of the comparison it was making, whether a Fifth Amendment violation can occur prior to trial. Although the Court did state that the Fifth Amendment right " . . . is a right which is properly asserted only during trial and only by defendants in a criminal proceeding," (*id.*) that was clearly dicta and essential neither to the holding of the case, nor to the comparison with Fourth Amendment rights.[7]

B. The Facts and Law of *Mahoney v. Kersey*

In *Mahoney v. Kersey, supra*, a jury awarded Plaintiff Mahoney, a college student, $20,000 in his suit under 42 U.S.C. § 1983 against Kersey a Milwaukee police officer for false arrest and malicious prosecution. At the trial there was no allegation of a coerced statement and no allegation that the Fifth Amendment and Fourteenth Amendment was violated by a coerced statement.

The quote Petitioner relies upon was made in the context of a tangential discussion on the issue of whether the defendant had waived objection to plaintiff's argument that malicious prosecution was a violation of the due process clause and whether malicious prosecution was a "constitutional tort," actionable as a claim under § 1983. In that discussion the *Mahoney* court discussed

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[7] "Dicta" is defined as: "(1) Opinions of a judge which do not embody the resolution or determinations of the court. (2) Expressions in a court's opinion which go beyond the facts before the court and are therefore individual views of the author of the opinion and not binding in subsequent cases." Black's Law Dictionary, West Pub., 5th Ed. p. 408.

Mahoney's argument to the jury that his right not to incriminate himself was infringed by the filing of criminal charges against him after he was questioned by the defendant officer.

The court noted that it had previously indicated that "the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case – otherwise, immunity statutes would be unconstitutional." (*Id.*, 1061-1062, cites omitted.) The court noted that there is an argument that coercion itself does violate constitutional rights, citing the Ninth Circuit's decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992). The court explicitly declined to reach the question of whether it would adopt the *Cooper* analysis, because it held that the officer had waived his objection to the point at issue. 976 F.2d at 1062. The Seventh Circuit decision does not constitute authority on this issue one way or the other and therefore cannot conflict with the holding in *Martinez*.

IV. CONCLUSION

This Court should not grant this petition for certiorari as the Petitioner's argument depends upon the assertion of facts that were rejected by the District Court and the Ninth Circuit.

The Court should not review the decision of the Court below based on Petitioner's assertion that the issue is whether there is a remedy under 42 U.S.C. § 1983 for failure to warn a suspect in custody of his *Miranda* rights. The case below established that the Petitioner engaged in coercive questioning after the Respondent asserted his

right to decline to answer questions and that the Petitioner intentionally violated his rights by questioning him notwithstanding his assertion of his right to remain silent and his debilitating mental and physical state of disability. That conduct violated respondent's rights irrespective of whether he had received the *Miranda* warnings and the issue urged by the Petitioner was not the holding below.

Respondent respectfully requests the petition be denied.

Respectfully submitted,

R. Samuel Paz
(*Counsel of Record*)
Sonia Mercado
Biltmore Court – 7th Floor
520 S. Grand Avenue
Los Angeles, California 90071

(15)

Supreme Court, U.S.
FILED
SEP 5 2002
CLERK

No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive, Suite 1500
Oxnard, CA 93036

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030

Counsel for Petitioner

R. SAMUEL PAZ*
Law Offices of R. Samuel Paz
Biltmore Court 7th Floor
520 S. Grand Avenue
Los Angeles, CA 90071
(310) 410-2981

SONIA MERCADO
Sonia Mercado & Associates
Biltmore Court 7th Floor
520 S. Grand Avenue
Los Angeles, CA 90071
(213) 683-5313

Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 26, 2002
CERTIORARI GRANTED JUNE 3, 2002

28 pp

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RELEVANT DOCKET ENTRIES NOT INCLUDED

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear at the pages indicated in the appendix to the Petition for a Writ of Certiorari:

Opinion of the United States Court of Appeals
for the Ninth Circuit, dated October 20, 2001 ..... 1a

Order of the United States District Court
for the Central District of California,
dated August 1, 2000 ..... 15a

Order of the United States Court of Appeals
for the Ninth Circuit, dated December 26, 2001 .... 31a

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

98-CV-9313

MARTINEZ,
Plaintiff,

v.

OXNARD, CITY OF, *et al.*
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
2/25/00	22	FIRST AMENDED COMPLAINT [1-1] by plaintiff Oliverio Martinez; adding Lopez Art, Maria Pena, Andrew Salinas, Ben Chavez, Ron Zavala; jury demand. Summons not issued (jp) [Entry date 02/28/00]
3/29/00	25	ANSWER filed by defendants Chief Art Lopez esa Chief Lopez Art, Maria Pena, Andrew Salinas, Ben Chavez, Ron Zavala to 1st amended complaint [22-1]; jury demand (rrey) [Entry date 03/29/00]

DATE	NO.	PROCEEDINGS
6/5/00	35	NOTICE OF MOTION AND MOTION by plaintiff Oliverio Martinez for summary adjudication of issues Memo of PA/ Decl of Sonia Mercado and Prop Order ; motion hearing set for 10:00 6/26/00 (lk) [Entry date 06/09/00]
6/5/00	35	STATEMENT of U/Facts and C/Law by plaintiff Oliverio Martinez re motion for summary adjudication of issues [35-1] (lk) [Entry date 06/09/00]
6/12/00	37	OPPOSITION by defendants to plfs motion for summary adjudication of issues [35-1] ; decl of Kevin M McCormick(rrey) [Entry date 06/13/00]
6/12/00	38	STATEMENT GENUINE ISSUES by defendants in opp to plfs motion for summary adjudication of issues [35-1] (rrey) [Entry date 06/13/00]
6/29/00	41	STIPULATION and ORDEP. by Judge Florence-Marie Cooper IT IS SO ORD: dismissing party dfts Harold Hurtt, Lopez Art; dismissing w/ prejudice 2nd, 3rd, 4th, & 5th clms for relief of the 1st A/C as to all dfts (rrey) [Entry date 06/30/00]

DATE	NO.	PROCEEDINGS
7/3/00	42	REPLY by plaintiff in suppt of motion for summary adjudication of issues [35-1] ; decl of F Samuel Heredia (rrey) [Entry date 07/12/00]
7/17/00	45	SUPPLEMENTAL OPPOSITION by plaintiff to dfts oral mot for S/J on qualified immunity (rrey) [Entry date 07/18/00]
7/24/00	46	MEMORANDUM of PA's by defendant Maria - Pena, defendant Andrew Salinas, defendant Ben Chavez, defendant Ron Zavalain support of qualified immunity re minutes [43-1]; Chavez Decl and Devereaux Decision appended in support thereof. (lk)[Entry date 07/25/00]
7/31/00	48	SUPPLEMENTAL REPLY by plaintiff Oliverio Martinez to Dfts oral mot for qualified immunity (ad) [Entry date 08/02/00]

8/31/00	50	NOTICE OF APPEAL by defendant Ben Chavez to 9th C/A from Dist. Court Ord fld 8/1/00 & ent 8/2/00 [47-1] (cc: Jeffrey Held, Law Offices of Alan E. Wisotsky; R. Samuel Paz, Law Offices of R. Samuel Paz; Sonia M. Mercado, Sonia Mercado & Associates; F. Samuel Heredia, Heredia & Associates) Fee: Paid. (pjap) [Entry date 09/01/00]

STATEMENT OF:

OLIVERIO MARTINEZ

INTERVIEWED BY:

OFFICER CHAVEZ

LOCATION:

ST. JOHN'S REGIONAL MEDICAL CENTER

TAPE 1 **SIDE A**

Statement of: Oliverio Martinez

Interviewed by: Officer Chavez

Location: St. John's Regional Medical Center

Tape 1 Side A

****

(Unintelligible background voices)

Chávez:	I think it's Olivero, I'm not sure.	Chavez:	I think it's Olivero, I'm not sure.
	Olivero Martinez.		Olivero Martinez.
	(Unintelligible) Olivera ¿Cuándo naciste?		(Unintelligible) Olivera When were you born?
O.M.:	(Unintelligible)	O.M.:	(Unintelligible)
Chavez:	¿Cuándo naciste?	Chavez:	When were you born?
O.M.:	Yo no me acuerdo.	O.M.:	I do not remember.

(Unintelligible background voices)

Chavez:	Oliverio Martínez. ¿Señor, cómo te llamas?	Chavez:	Oliverio Martinez. Sir, what is your name?
O.M.:	Me duele...	O.M.:	It hurts...

Chavez:	¿Cómo te llamas? Can anyone make out what the words are in his chest?	Chavez:	What is your name? Can anyone make out what the words are in his chest?
Unidentified	M-O-N		
Chavez:	Monique. Hey, Lee can you go check with booking and them run the name Monique across the chest. A tatoo check.		
Unidentified	Ami....amigo, muevate las (sic)-los pies, mueverte.	Unidentified	Fri friend, move the the feet, move.
O.M.:	No puedo.	O.M.::	I can't.
Unidentified	Mueve los pies, mueve los pies.	Unidentified	Move the feet, move the feet.
O.M.:	No puedo, no puedo, no puedo.	O.M.:	I can't, I can't, I can't.
Unidentified	....an 11 by...		
Chavez:	Olivero. ¿Qué pasó? Olivero, dígame qué pasó.	Chavez:	Olivero. What happened? Olivero, tell me what happened.
O.M.:	No sé.	O.M.:	I don't know.

Chavez:	¿No sé qué pasó? (sic)	Chavez:	I don't know what happened (sic)?
(Unidentified medical personnel)			
O.M.:	¡Ay! ¡Me estoy muriendo! ¡Ay! ¿Qué me están haciendo?	O.M.:	Ay! I am dying. Ay! What are you doing to me?
(Unintelligible background voices)			
O.M.:	¡No, ...! (unintelligible scream.)	O.M.:	No, ...! (unintelligible scream).
Chavez:	¿Qué pasó, señor?	Chavez:	What happened, sir?
O.M.:	Me duele mi pie...	O.M.:	My foot hurts...
Chavez:	Olivera. Señor, ¿qué pasó?	Chavez:	Olivera. Sir, what happened?
O.M.:	Me estoy ahogando.	O.M.:	I am choking.
Chavez:	Dígame, ¿qué pasó?	Chavez:	Tell me what happened.
O.M.:	No sé.	O.M.:	I don't know.
Chavez:	"No sé."	Chavez:	"I don't know."
O.M.:	Me duele mi pierna.	O.M.:	My leg hurts.
Chavez:	¿No sé qué pasó? (sic)	Chavez:	I don't know what happened (sic)?
O.M.:	Me duele...	O.M.:	It hurts...

(Tape turns off and on)

Chavez:	Hey, hey mire.	Chavez:	Hey, hey look.
O.M.:	Me estoy ahogando.	O.M.:	I am choking.
Chavez:	¿Puede oir? mire oiga, yo soy Benjamin Chávez de la policía de aquí de Oxnard, mire.	Chavez:	Can you hear? look listen, I am Benjamin Chavez with the police here in Oxnard, look.
O.M.:	Me estoy muriendo, por favor.	O.M.:	I am dying, please.
Chavez:	Ok, sí, dígame qué pasó si vas a morir, dígame qué pasó. Mire necesito decir (sic) qué pasó.	Chavez:	OK, yes, tell me what happened. If you are going to die, tell me what happened. Look I need to tell (sic) what happened.
O.M.:	No sé.	O.M.:	I don't know.
Chavez:	You don't know, ¿No sé qué pasó? (sic) ¿Habló con la policía?	Chavez:	You don't know, I don't know what happened (sic)? Did you talk to the police?
O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Qué pasó con la policía?	Chavez:	What happened with the police?

O.M.:	Peleamos.	O.M.:	We fought.
Chavez:	¿Huh? Qué pasó con la policía?	Chavez:	Huh? What happened with the police?
O.M.:	La policía me dieron un balazo.	O.M.:	The police shot me.
Chavez:	¿Porqué?	Chavez:	Why?
O.M.:	Porque yo estaba peleando con él.	O.M.:	Because I was fighting with him.
Chavez:	Oh, ¿porqué estaba peleando con la policía?	Chavez:	Oh, why were you fighting with the police?
O.M.:	Me estoy muriendo...	O.M.:	I am dying...
Chavez:	Ok, sí estas muriendo, pero dígame ¿porqué estás peleando, estabas peleando con la policía?	Chavez:	OK, yes you are dying, but tell me why you are fighting, were you fighting with the police?
O.M.:	I don't know.	O.M.:	I don't know.
Chavez:	You don't know, did you get his gun? ¿Agarró la pistola del otro policía?	Chavez:	You don't know, did you get his gun? Did you grab the gun of the other policeman?
O.M.:	Sí.	O.M.:	Yes.

Chavez:	Sí. ¿Querías matar a la policía o qué? (sic)	Chavez:	Yes. Did you want to kill the police or what? (sic)
O.M.:	No.	O.M.:	No.
Chavez	¿Quería tirar balazos a la polícia?	Chavez	Did you want to shoot at the police?
O.M.:	No.	O.M.:	No.
Chavez:	No. ¿Porqué agarró la pistola de la policía?	Chavez:	No. Why did you grab the gun of the police?
O.M.:	Yo quería tirar.	O.M.:	I wanted to throw/shoot *
Chavez:	Y quería tirar. Y no se apuntó la pistola a la policía. (sic)	Chavez:	And wanted to shoot. And the gun was not pointed to the police. (sic)
O.M.:	No.	O.M.:	No.
Chavez:	No.	Chavez:	No.
O.M.:	Doctor, por favor quiero aire, me estoy muriendo.	O.M.:	Doctor, please I want air, I am dying.
Chavez:	OK, ok. Yo quiero saber si usted se apuntó la pistola a la policía. (sic)	Chavez:	OK, OK. I want to know if you pointed the gun [to yourself] at the police.

O.M.:	Sí.	O.M.:	Yes.
Chavez:	Sí, ¿y usted se puntó (sic) ¿a la policía puntó la pistola? (sic) ¿Huh?	Chavez:	Yes, and you pointed it [to yourself]? (sic) at the police pointed the gun? (sic) Huh?
O.M.:	Me estoy muriendo, por favor...	O.M.:	I am dying, please...
Chavez:	Ok, ok, ok ¿puntó la pistola a la policía? (sic)	Chavez:	Ok, ok, ok, pointed the gun at the police? (sic)
O.M.:	No sé nada.	O.M.:	I don't know anything.
Chavez:	Ok.	Chavez:	OK.
O.M.:	Yo (unintelligible)	O.M.:	I (unintelligible)

(Tape turns off and on)

Chavez:	Hey, Olivera, Olivera, soy el policía-O-Oficial Chávez, otra vez, ¿ok?	Chavez:	Hey, Olivera, Olivera, I am the policeman-O-Officer Chavez, again, ok?
O.M.:	Me-me esta doliendo mucho...	O.M.:	It it hurts a lot...

Chavez:	OK, oiga, oiga yo quiero saber qué pasó, ¿ok?	Chavez:	OK, listen, listen I want to know what happened, ok??
O.M.:	Yo quiero que me curen.	O.M.:	I want them to treat me.
Chavez:	OK, ellos vas hacerlo (sic), mire cuando usted se sacó la pistola de la-la cinta (sic) de la policía...	Chavez:	OK, they are do it (sic), look when you took out the gun from the the tape (sic) of the police...
O.M.:	Me estoy muriendo...	O.M.:	I am dying...
Chavez:	Ok, mire, lo que yo quiero saber si usted se sacó (sic) la pistola de la policía?	Chavez:	Ok, look, what I want to know if you took out (sic) the gun of the police?
O.M.:	Yo no te digo nada hasta que no me curen.	O.M.:	I am not telling you anything until they treat me.
Chavez:	Mire, dígame qué pasó, yo quiero saber, mire pues no quieres que la policía sabe (sic) qué pasó contigo?	Chavez:	Look, tell me what happened, I want to know, look well don't you want the police know (sic) what happened with you?

O.M.:	¡Uuuggghhh! me duele mi panza...	O.M.:	Uuuggghhh! my belly hurts...
Chavez:	Señor, si vas a morir no quiero que la policía dice qué pasó con usted (sic), yo quiero saber qué está pasando, qué pasó con usted (sic) ¿Huh? ¿Señor, señor?	Chavez:	Sir, if you are going to die I don't want the police tell what happened with you (sic), I want to know what is happening, what happened with you (sic) Huh? Sir, sir?
O.M.:	Yo quiero que me curen.	O.M.:	I want to be treated.
Chavez:	Ok.	Chavez:	OK.
O.M.:	Por favor.	O.M.:	Please.
Chavez:	Mire, ellos están haciendo todo por usted ahorita, ¿pero dígame qué pasó? La pistola, ¿dígame qué pasó?	Chavez:	Look, they are doing everything for you right now, but tell me what happened? The gun, tell what happened?
O.M.:	Yo la jale la pistola.	O.M.:	I pulled the gun.
Chavez:	¿De la cinta (sic) de la policía?	Chavez:	From the tape [sheath] (sic) of the police?
O.M.:	Sí.	O.M.:	Yes.

Chavez:	Sí. ¿Cómo? ¿cuando ustedes estaban peleando?	Chavez:	Yes. How? when you were fighting?
O.M.:	Sí.	O.M.:	Yes.
Chavez:	Sí.	Chavez:	Yes.
O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Ustedes (sic) estaban peleando con la policía?	Chavez:	You (plural) (sic) were fighting with the police?
O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Y usted se sacó la pistola del la policía del-de la cinta? (sic)	Chavez:	And you took out the gun of the police from the tape [sheath] (sic)?
O.M.:	Sí.	O.M.:	Yes.
Chavez:	No puedo oir.	Chavez:	I can't hear.
O.M.:	Sí.	O.M.:	Yes.
Chavez:	Sí. ¿Se sacó? (sic)	Chavez:	Yes. Took it out? (sic)
O.M.:	Sí.	O.M.:	Yes.
Chavez:	Sí. ¿Qué pasó con esto, cuando se sacó? (sic)	Chavez:	Yes. What happened with this, when took it out? (sic)
O.M.:	La apunte.	O.M.:	I pointed it.
Chavez:	¿A la policía?	Chavez:	At the police?

O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Y qué pasó después de eso?	Chavez:	And what happened after that?
O.M.:	Me tiraron un balazo, es todo.	O.M.:	They shot me once, that's all.
Chavez:	Ok, ¿es todo lo qué recuerdo? (sic)	Chavez:	Ok, Is that all I remember (sic)?
O.M.:	Yeah.	O.M.:	Yeah.
Chavez:	¿Porqué se puntó la pistola a la policía? (sic)	Chavez:	Why was the gun pointed at the police? (sic)
O.M.:	Nomas pa' que, pa' que parara.	O.M.:	Just so that, that, to stop.
Chavez:	Ah, que se paro (sic). Ok. Uh, mire, mire oiga yo quiero saber...	Chavez:	Ah, that stop (sic). OK. Uh, look look listen I want to know...
O.M.:	Quiero aire, quiero aire.	O.M.:	I want air, I want air.
Chavez:	Ok, ok hey mire, ¿estaba tomando hoy?	Chavez:	OK, ok hey look, were you drinking today?
O.M.:	Me estoy ahogando...	O.M.:	I am choking...
Chavez:	¿Estaba tomando hoy?	Chavez:	Were you drinking today?

O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Cuántas?	Chavez:	How many?
O.M.:	No sé eso.	O.M.:	I don't know that.
Chavez:	¿No sé cuanto ha tomando? (sic) ¿Usa drogas?	Chavez:	I don't know how much have drunk? (sic) Do you use drugs?
O.M.:	(Unintelligible)	O.M.:	(Unintelligible)
Chavez:	¿Oiga, usa drogas?	Chavez:	Listen, do you use drugs?
O.M.:	Sí.	O.M.:	Yes.
Chavez:	¿Qué tipo de drogas usa?	Chavez:	What kind of drugs do you use?
O.M.:	Me duele...	O.M.:	It hurts...
Chavez:	Señor, ¿qué tipo de drogas usa?	Chavez:	Sir, what kind of drugs do you use?
O.M.:	Heroina.	O.M.:	Heroin.
Chavez:	¿Cuándo uso la, la última vez que uso heroina?	Chavez:	When was the, the last time you used heroin?
O.M.:	Esta noche.	O.M.:	Tonight.
Chavez:	¿Esta noche? ¿Esta usando todavia, cada dia?	Chavez:	Tonight? Are you still using, everyday?
O.M.:	Sí.	O.M.:	Yes.

Chavez:	¿Cuántas veces al día?	Chavez:	How many times a day?
O.M.:	Me duele el estomago. Me duele mucho, me duele mucho, uuuggghhh...	O.M.:	My stomach hurts. It hurts a lot, it hurts a lot, uuuggghhh...

(Unintelligible background voices)

O.M.:	Por favor, por favor me duele mucho, por favor.	O.M.:	Please, please it hurts a lot, please.
	(Tape turns off and on)		(Tape turns off and on)
O.M.:	Por favor, por favor, por favor.	O.M.:	Please, please, please.
Chavez:	Hey, señor...	Chavez:	Hey, sir...
O.M.:	Me duele...	O.M.:	It hurts...
Chavez:	Señor, ¿que estaban (sic) haciendo allí en el field (sic)?	Chavez:	Sir, what were you (plural) (sic) doing there in the field (sic)?
O.M.:	Nada.	O.M.:	Nothing.
Chavez:	Nada, ¿porqué se corrió (sic) de la policía?	Chavez:	Nothing, why did you run (sic) from the police?
O.M.:	Ya no quiero decir nada.	O.M.:	I don't want to say anything anymore.

Chavez:	¿No?	Chavez:	No?
O.M.:	Quiero que me curen, me esta doliendo mucho, por favor.	O.M.:	I want them to treat me, it hurts a lot, please.

(Unintelligible background voices)

Chavez:	¿No quiere que decir (sic) qué pasó con usted allí?	Chavez:	You don't want to tell (sic) what happened with you over there?
O.M.:	No me quiero morir, no me quiero morir.	O.M.:	I don't want to die, I don't want to die.
Chavez:	Pues si vas a morir dígame qué pasó, ¿y usted piensa que vas a morir ahorita?	Chavez:	Well if you are going to die tell me what happened, and right now you think you are going to die?
O.M.:	No.	O.M.:	No.
Chavez:	¿No, piensa que vas a morir?	Chavez:	No, do you think you are going to die?
O.M.:	¿No me vas a curar o qué?	O.M.:	Aren't you going to treat me or what?

Chavez:	Mire, piense que vas a cu...morir, (sic) es todo yo quiero saber, si usted piensa que vas a morir? ¿Piensa que vas a morir ahorita?	Chavez:	Look, think you are going to die, (sic) that's all I want to know, if you think you are going to die? Right now, do you think you are going to die?
O.M.:	Me duele mi panza, porfavor curame.	O.M.:	My belly hurtrs, please treat me.
Chavez:	¿Señor?	Chavez:	Sir?
O.M.:	Si me curas te digo todo, si no no.	O.M.:	If you treat me I tell you everything, if not, no.
Chavez:	¿Señor, quiero saber si usted piensa que vas a morir ahorita?	Chavez:	Sir, I want to know if you think you are going to die right now?
O.M.:	Yo pienso que sí.	O.M.:	I think so.
Chavez:	¿Usted pienso (sic) que sí? Ok. Mire, los médicos vas ayudar con todo lo que pueden hacer. ¿Ok?. Que pueden hacer.	Chavez:	You think (sic) so? Ok. Look, the doctors are going to help you with all they can do, Ok?. That they can do.

O.M.:	Pos ya, que me estoy muriendo, ¿No me estas viendo? pues	O.M.:	Get moving, I am dying, can't you see me? come on.
Chavez:	Ah, huh, te están dando medicinas ahorita.	Chavez:	Ah, huh, right now they are giving you medication.
O.M.:	Uuuggghhh...	O.M.:	Uuuggghhh...

(Tape finishes)

The enclosed page has the following transcription and translation:

TRANSLATION: **TRANSLATION:**

O.M.: Yo queria tirar. O.M.: I wanted to shoot.

Translators comment: The word *"tirar"* has three different meanings:

to shoot

to throw away

to drop

Because of the ungrammatical structure of this sentence, the phrase is subject to more than on interpretation.

[SEAL]

SHERRI R. CARTER
Clerk of the Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
312 NORTH SPRING STREET, ROOM G-8
LOS ANGELES, CA 90013
213-894-4440
Fax: 213-894-6868

SOUTHERN DIVISION
751 W. Santa Ana Blvd.,
Rm. 101
Santa Ana, CA 92701
714-836-3468

EASTERN DIVISION
4100 Main Street
Riverside, CA 92501
909-276-6170

COURT INTERPRETER SERVICES

DECLARATION OF INTERPRETER

I, the undersigned, say: I am a Spanish/English and English/Spanish Official Court Interpreter certified by the Administrative Office of the United States Courts and I have translated the attached document(s) from English into Spanish. I declare, under penalty of perjury, that to the best of my abilities and belief, this is a true and correct translation of the English language text.

DESCRIPTION OF DOCUMENT(S)

Executed this 13th day of April, [19__] 2000, at ~~Los Angeles~~ Oxnard, California.

CAL NORMAN
Name of Interpreter [PRINT]

/s/
Signature of Interpreter

This translation was originally completed by a State of California certified court interpreter. I have listened to the entire recording and reviewed the translation making changes or amendments where I deemed necessary and thus have adopted the translation as my own

Case No.:
Ordered by:
File Name:
No. of Words

ENGCRT.94

SUPREME COURT OF THE UNITED STATES

01-1444

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

June 3, 2002
Case below, 270 F.3d 852

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

(8)

Supreme Court, U.S.
FILED
SEP 5 2002
CLERK

No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

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QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. § 1983 alleging that his interrogation of respondent was unduly coercive, in violation of the Fifth and Fourteenth Amendments, where no statement made by respondent has ever been used against him in a criminal case and the officer's undisputed purpose was to obtain evidence from an individual, shot by police, before that individual's anticipated imminent death.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b), petitioner Ben Chavez states that there were no parties in the court of appeals who are not parties in this Court. In the trial court, the defendants in addition to Chavez were the City of Oxnard, the Oxnard Police Department, Chief Art Lopez, in his official and individual capacities, Chief Harold Hurtt, in his individual capacity, and Officers Maria Peña, Andrew Salinas, and Ron Zavala, in their official and individual capacities. Defendants Lopez and Hurtt were both dismissed from the case by the trial court before the entry of judgment. See J.A. 3.

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The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 270 F.3d 852. The order denying rehearing (Pet. App. 31a-32a) is unreported. The district court's opinion granting in part and denying in part respondent's motion for summary adjudication (Pet. App. 15a-30a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on October 30, 2001, and rehearing was denied on December 26 (Pet. App. 1a, 31a). The petition for certiorari was timely filed on March 26, 2002, and granted on June 3. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part: "No person * * * shall be compelled in any criminal case to be a witness against himself." Section 1 of the Fourteenth Amendment provides in part: "No State shall * * * deprive any person of life, liberty, or property without due process of law." 42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *."

STATEMENT

This case arises from the aftermath of a tragic struggle between respondent Oliverio Martinez and two police officers who were investigating suspected narcotics activities. In the course of a search and subsequent altercation, respondent apparently took control of a firearm from one of the officers. The second officer fired several shots at respondent, causing him severe injuries.

Petitioner Ben Chavez, a patrol supervisor, arrived on the scene thereafter and accompanied respondent to the hospital. There, intermittently over the course of about 45 minutes,

petitioner questioned Martinez about the officer-involved shooting. None of respondent's statements, however, was ever used against him in a criminal case. Even so, the Ninth Circuit, relying on its previous en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220, cert. denied, 506 U.S. 953 (1992), held that petitioner's interrogation violated respondent's rights under the Compulsory Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, and that a defense of qualified immunity could not be invoked in respondent's lawsuit under 42 U.S.C. § 1983.

1. On November 28, 1997, police officers Maria Peña and Andrew Salinas were investigating suspected narcotics activity near a vacant lot in a residential area of Oxnard, California. Pet. App. 2a. The officers had previously received information that narcotics were being sold from a shed located on the property. C.A. App. 171.[1] While questioning one individual, Salinas and Peña heard a bicycle approaching on the darkened path that traversed the lot. Salinas ordered the rider, respondent Martinez, to stop, dismount, spread his legs, and place his hands behind his head. Respondent complied. Pet. App. 2a-3a.

As Salinas approached Martinez to perform a search, respondent began to run, fearing that Salinas would discover a knife that he had concealed in the back of his trousers. C.A. App. 38-39, 308. A struggle ensued. According to Peña's deposition testimony, respondent reached behind him as if to draw his knife; Peña grabbed the knife and threw it some distance from the combatants. C.A. App. 180-181. At some point in the mêlée, Martinez apparently obtained control of Salinas's handgun. C.A. App. 39, 209.

According to the two officers, there was a struggle for control of the weapon, with Martinez pointing the barrel multiple times in the direction of both Salinas and Peña. C.A. App. 184-85, 211. Salinas, convinced that Martinez was going

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[1] "C.A. App." refers to the Excerpts of Record filed in the court of appeals.

to kill him (C.A. App. 209), cried out, "He's got my gun." Pet. App. 3a. Peña drew her weapon and fired several times. One bullet penetrated respondent's left eye and damaged the optic nerve of his other eye, rendering him blind. Another bullet fractured a vertebra, paralyzing respondent's legs. Three more bullets hit respondent's leg. *Ibid.*

Petitioner Chavez, a patrol supervisor, arrived on the scene minutes later with paramedics. Pet. App. 3a. After speaking with the two officers, Sergeant Chavez accompanied respondent to the hospital. *Id.* at 3a-4a. There, in the presence of medical personnel, petitioner sought to learn from respondent precisely what had happened in the incident. C.A. App. 98-99, 111-113, 228, 270. The interview lasted only 10 minutes and 7 seconds of actual conversation, spread out over a 45-minute period, with Chavez remaining outside the emergency room for periods of time to permit medical personnel to attend to Martinez. Pet. App. 4a; C.A. App. 451.

In response to petitioner's questions, respondent acknowledged that he had been shot because he was fighting with the police (J.A. 11); that he had "pulled" Salinas's gun (J.A. 15; see also J.A. 16); that he had "pointed" the gun at Salinas (J.A. 16; see also J.A. 17); that he used heroin every day, including that very evening (J.A. 18); and that he had been drinking that day as well (J.A. 17-18). Martinez also stated that he was in enormous pain, thought he was dying, and wanted treatment. J.A 20-22; see also J.A. 11-12. Based on his observations of Martinez's condition and respondent's statements, Chavez believed that respondent would die from his injuries. C.A. App. 38, 114, 452-453; J.A. 11-12, 20-22.

2. Respondent thereafter filed a complaint under 42 U.S.C. § 1983 alleging that the officer defendants had violated his constitutional rights by stopping him without probable cause (in violation of the Fourth Amendment), using excessive force (also in violation of the Fourth Amendment), and subjecting him to a coercive interrogation while he was receiving medical care (in violation of the Fifth, Eighth, and Fourteenth Amendments). Pet. App. 4a-5a.

The defendants (including petitioner) asserted a qualified immunity defense, contending that they could not reasonably have known, at the time of the events in question, that their conduct violated "clearly established" constitutional rights. In that connection, defendants drew particular attention to the purpose of petitioner's interrogation: "to preserve the key non-police witness's account of events before the individual expires." C.A. App. 445. Defendants asserted that a "careful reader" of the governing case law would not have known that this interrogation, "designed to preserve a dying witness's account," would be unconstitutional. C.A. App. 447-448.

The district court granted partial summary judgment in respondent's favor, holding that petitioner could not invoke a qualified immunity defense to respondent's Fifth and Fourteenth Amendment challenges to the interrogation. Pet. App. 15a-30a.[2] The court first addressed the question whether a constitutional violation had been established at all. Although respondent had not been prosecuted, nor had his statement been offered into evidence at any criminal trial, the district court held that "[t]he test" for purpose of a Section 1983 claim under both the Fifth and Fourteenth Amendments was "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Id.* at 19a. Examining "the totality of the circumstances in this case," the district court held that respondent's "statement was not voluntarily given," in violation of both the Fifth and Fourteenth Amendments. *Id.* at 22a-23a.

The district court next rejected Chavez's defense that he had not violated any "clearly established" right. Pet. App. 25a-29a. The court recognized that "[p]ublic officials exercising

[2] The district court denied respondent's motion insofar as it sought summary adjudication of respondent's Eighth Amendment challenge to his interrogation and Fourth Amendment challenge to his stop and detention. Pet. App. 23a-25a. No issue under the Fourth or Eighth Amendment was before the court of appeals or is before this Court.

discretionary authority are entitled to qualified immunity from suit where their actions '[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 26a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (brackets by the district court)). Nevertheless, the court explained, "[t]he law against coerced confessions was clearly established at the time of [respondent's] interview," and "no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible." Pet. App. 29a.

The court noted Chavez's contention that he was not "trying to build a criminal case" against Martinez when he questioned him, but rather was seeking "to preserve a dying witness's account" of an officer-involved shooting. Pet. App. 28a-29a; C.A. App. 447-448. The district court dismissed that distinction, however, because Chavez "had no knowledge of whether or not a prosecutor would charge [Martinez] if he survived." In any event, the district court added, Chavez "was clearly trying to obtain information that could clear the officers of wrong-doing." Pet. App. 29a.

3. The Ninth Circuit affirmed. Pet. App. 1a-14a. The court first held that respondent had "stated a *prima facie* claim that Chavez violated one of his constitutional rights." *Id.* at 6a (citing *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001)). With respect to the Fifth Amendment claim, the court ruled that "Chavez's coercive, custodial questioning violated [respondent's] substantive Fifth Amendment right against compulsory self-incrimination." Pet. App. 8a. Relying on its own en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220, cert. denied, 506 U.S. 953 (1992), the Ninth Circuit stated (Pet. App. 8a, 9a) that "a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody," even if those statements are never "used against" the suspect "in a criminal proceeding." The panel "recognize[d]" (*id.* at 10a n.3) what it termed "dicta to the contrary" in this Court's decision in *United States* v. *Verdugo-Urquidez*, 494

U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.") (citation omitted). The Ninth Circuit considered it appropriate, however, "to follow [its] own binding precedent rather than Supreme Court dicta." Pet. App. 10a n.3.

The court of appeals next reached the same result under the Due Process Clause of the Fourteenth Amendment. Pet. App. 10a-11a. Quoting from *Cooper*, the court held that "coercive behavior of law-enforcement officers in pursuit of a confession" is sufficient, without more, to constitute a due process violation. *Ibid.*

Finally, the panel held that the rights in question were clearly established. Pet. App. 11a-14a. The court acknowledged that, to overcome a claim of qualified immunity, "[t]he contours" of the constitutional right at issue "'must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.'" *Id.* at 11a (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added)). The panel recognized, as well, that such an inquiry necessarily turns on "the specific facts of this case." Pet. App. 12a. Nevertheless, the Ninth Circuit concluded that "[a] reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received *Miranda* warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation." *Ibid.* In that connection, the panel asserted that this Court in *Mincey* v. *Arizona*, 437 U.S. 385 (1978), had held "a virtually indistinguishable interrogation" to be unconstitutional. Pet. App. 12a-14a. Indeed, the panel held, "[t]o the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious" (Pet. App. 13a) –

notwithstanding petitioner's contention that, unlike *Mincey*, the interrogation in this case was undertaken "to preserve the account of a moribund key witness," not "to obtain incriminating statements." C.A. Opening Br. 18, 19.

SUMMARY OF ARGUMENT

A. In deciding whether a defense of qualified immunity may be overcome, courts must "determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, only then should a court ask whether the right allegedly implicated was clearly established at the time of the events in question." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998). Respondent's constitutional claims fail at this threshold: Neither the Compulsory Self-Incrimination Clause of the Fifth Amendment, nor the Due Process Clause of the Fourteenth Amendment, provides a basis for respondent's challenge to the interrogation in this case.

1. As this Court explained in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." That statement – which the court below erroneously disregarded as mere "dicta" – follows naturally from the text of the Compulsory Self-Incrimination Clause, which protects a declarant *only* from being "compelled *in any criminal case* to be a *witness* against himself." U.S. CONST. Amend. V (emphasis added).

This Court's cases reflect that fundamental limitation: As long ago as *Brown* v. *Walker*, 161 U.S. 591 (1896), and as recently as *United States* v. *Balsys*, 524 U.S. 666 (1998), the Court has made clear that the Fifth Amendment is not violated merely by coercive questioning – or even questioning that elicits otherwise incriminating statements – so long as none of the compelled statements is used against the witness in a criminal case. Because none of respondent's statements to Chavez

has ever been used against him in a criminal case, there was no violation of respondent's Fifth Amendment rights.

2. Nor does coercive questioning, without more, violate the Fourteenth Amendment. This Court has never concluded that an interrogation alone can give rise to a claim under the Fourteenth Amendment. Instead, for the past 70 years, this Court has repeatedly explained that the prohibition against use of coerced confessions is grounded in the right to a fair trial. See *Brown* v. *Mississippi*, 297 U.S. 278, 285-287 (1936); *Dickerson* v. *United States*, 530 U.S. 428, 435 n.1 (2000). Thus, the Fourteenth Amendment right that has been discussed in this Court's "voluntariness" cases, like the Fifth Amendment privilege against compelled self-incrimination, is irrelevant when there has been no use of a compelled statement in a criminal trial.

There may well be a "substantive" due process right to be free of particularly brutal forms of police questioning, regardless of whether the resulting statement is used in a criminal trial. For three independent reasons, however, respondent has failed to assert a sustainable claim under a traditional substantive due process analysis. First, contrary to the Ninth Circuit's conclusion below and in *Cooper*, 963 F.2d at 1248, there is no "right to silence." As the Seventh Circuit has correctly concluded, for purposes of substantive due process analysis "[t]he relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation." *Wilkins* v. *May*, 872 F.2d 190, 195 (1989).

Second, respondent has not alleged that petitioner intended to injure respondent, as is required to establish a substantive due process claim under *County of Sacramento* v. *Lewis, supra*.

Third, not only must a high threshold be met before substantive due process analysis applies at all, but also the governmental interests at stake must be weighed against the liberty infringed before it can be concluded that an officer's conduct "shocks the conscience." That is true in this as in any other

category of substantive due process cases, indeed any category of due process cases. Respondent's interest in avoiding Chavez's questioning was outweighed by the competing governmental interests at stake in the exigent circumstances of this case. Chavez had entirely legitimate interests in obtaining respondent's version of the facts before respondent's anticipated imminent death. Chavez engaged in no particularly egregious behavior to aggravate the unpleasantness inherent in trying to obtain information from a person in urgent need of medical attention and thought to be dying. For those reasons, there was clearly no violation of substantive due process.

B. In all events, respondent cannot plausibly maintain that the interrogation in this case violated a right under the Fifth or Fourteenth Amendments that was "clearly established" at the time of the interrogation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

1. With respect to the Fifth Amendment, all that was "clearly established" at the time of the interrogation is that coercive questioning, without an actual "use" of the compelled statements, does *not* violate the Fifth Amendment. But even if the Ninth Circuit's contrary understanding of the Fifth Amendment is correct, surely that contrary view was not "clearly established" as of November 28, 1997. Rather, seven years before the interrogation in this case, this Court had stated in *Verdugo-Urquidez* that the Fifth Amendment is *not* violated unless and until there is an adverse use of a compelled statement at a criminal trial. Petitioner cannot be held liable in damages for taking an action *permitted* by this Court's case law, simply because a court of appeals later characterizes this Court's statement as "dicta." What is more, the basis for the panel's contrary ruling – the Ninth Circuit's en banc decision in *Cooper* – had been rejected by every other circuit to have considered the issue. Thus, even if petitioner had consulted a law library while en route to the hospital, it is not "clear" that

he reasonably should have discerned the Fifth Amendment standard adopted by the Ninth Circuit in this case.

2. The Ninth Circuit's holding that the Fourteenth Amendment prohibits all coercion of statements, regardless of subsequent use in a criminal trial, is just as wrong as its Fifth Amendment holding. At a minimum, that controversial holding finds no support in this Court's cases and thus cannot be "clearly established." Nor was it "clearly established" that conduct such as that of Chavez violates the Fourteenth Amendment under a "shocks the conscience" analysis. Given the fact-intensive nature of the test, such a conclusion is highly implausible from the outset.

Numerous police invasions of bodily integrity for the purpose of preserving evidence have been held *not* to shock the conscience, making it at the very least unclear that non-invasive questioning for the same purpose would do so. *Cooper*, though it did involve non-invasive questioning, depended on highly unusual and distinguishable facts, including the conceded absence of any exigency. Numerous courts of appeals have rejected due process claims involving police questioning less justified and more aggressive than the questioning in this case. No case has ever held that a police officer violated substantive due process in circumstances materially similar to this case.

3. *Mincey* v. *Arizona* did not hold that the suspect should have a civil rights claim against his interrogators, but only that his statement could not be used at a criminal trial. It was thus categorically inappropriate to cite *Mincey* as a decision putting Chavez on notice that his conduct violated substantive due process. In any event, even if *Mincey* and other admissibility cases are regarded as defining the contours of the substantive due process right, there are important distinctions between *Mincey* and this case. Most particularly, the non-exigent interrogation of a witness (Mincey) who was not even able to speak is wholly different from the exigent interrogation of an articulate, though severely injured, witness (Martinez). Chavez's effort to obtain a dying declaration from a witness to a police shooting violated no clearly established constitutional right.

ARGUMENT

PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY FROM BOTH THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS ARISING FROM HIS INTERROGATION OF RESPONDENT

A. Petitioner's Interrogation Of Respondent Did Not Violate The Fifth Or Fourteenth Amendment

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2513 (2002); accord *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999); *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Only if respondent has made out a constitutional claim in the first place need the Court consider whether that claim was "clearly established" at the time of the interrogation. As we show below, neither the Fifth Amendment's Compulsory Self-Incrimination Clause, nor the Fourteenth Amendment's Due Process Clause, was violated by the interrogation in this case.

1. Because Respondent's Statements Were Never Used Against Him In A Criminal Case, There Was No Infringement Of His Privilege Against Compulsory Self-Incrimination

a. The Ninth Circuit held that, "[e]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's Fifth Amendment rights." Pet. App. 9a-10a. In the panel's view, "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity.'" *Id.* at 9a. Accordingly, the court concluded, "a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody." Pet. App. 8a.

The panel based that ruling on the en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir. 1992). *Cooper* – proof positive that hard cases make bad law – was a Section

1983 action against officers of the Tucson Police Department. The officers set out to obtain confessions from anyone they suspected of being the so-called "Prime Time Rapist," without regard to *Miranda* and through interrogation techniques calculated to break the witnesses down. The plaintiff was one such suspect, who – despite conclusive evidence that he was *not* the perpetrator of the rapes – was held incommunicado for some 24 hours and subjected to highly aggressive questioning, even after he asked (repeatedly) for counsel. The court of appeals – evidently frustrated by a perceived pattern of misconduct by the Tucson Police Department (see *id.* at 1241 (citing *Edwards* v. *Arizona*, 451 U.S. 477 (1981)), and 963 F.2d at 1245 (citing *Mincey* v. *Arizona*, 437 U.S. 385 (1978))) – held that the plaintiff could press both Fifth and Fourteenth Amendment claims against the police officers.

In addressing the Fourteenth Amendment claim, the court of appeals in *Cooper* asked this central question: "Can the coercing by police of a statement from a suspect in custody ripen into a full-blown Constitutional violation only if and when the statement is tendered and used against the declarant?" 963 F.2d at 1244. "We think not," was the court's answer. *Ibid.* Relying on this Court's decision in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the court of appeals stated that "[t]he due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself." *Id.* at 1244-1245. The court's Fifth Amendment analysis (*id.* at 1238-1244) assumed likewise that a constitutional violation could be complete without use of the statement at trial, but offered no reasoning to support that assumption.

Judge Brunetti, joined by Judges Leavy and Alarcón, dissented. 963 F.2d at 1253-1256.[3] After canvassing this Court's case law, Judge Brunetti observed that "it is the *use* of coerced statements that constitutes a Fifth Amendment violation." *Id.* at 1254 (emphasis in the original). Here, the dissent

[3] Judge Leavy, joined by Judges Alarcón and Brunetti, also wrote a separate dissent. 963 F.2d at 1256-1258.

explained, Cooper "faced no trial and accordingly none of his statements were offered against him. The language of the amendment, then, suggests that there was no violation of the Fifth Amendment." *Id.* at 1254-1255. The dissent also concluded that Cooper's substantive due process rights had not been violated. *Id.* at 1255-1256.

b. Judge Brunetti was exactly right in his *Cooper* dissent: The Ninth Circuit's understanding of the Fifth Amendment cannot be squared either with the text of the Amendment or with this Court's case law.

The Compulsory Self-Incrimination Clause provides that "[n]o person * * * shall be compelled *in any criminal case* to be a *witness* against himself." U.S. CONST. Amend. V (emphasis added). The Clause does not forbid all compulsion, or even such compulsion that elicits potentially incriminating statements. Only if and when an individual is compelled to be a "witness" against himself "in a[] criminal case" is there a violation of the Compulsory Self-Incrimination Clause. And that final but crucial step occurs only if the compelled statement is used, either directly or derivatively, in an actual prosecution.

True, a person may *invoke* the Fifth Amendment before use is made of the statement. "It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)). But while an early invocation of the Fifth Amendment may guard against a compromise of the privilege at a subsequent criminal proceeding, it is not until there is a *use* of the compelled statement "in a criminal case" that the Fifth Amendment has actually been breached. As this Court summarized the point in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990):

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.

See also *Oregon* v. *Elstad*, 470 U.S. 298, 306-307 (1985) (emphasis added and deleted) ("[t]he Fifth Amendment prohibits *use* by the prosecution in its case in chief * * * of compelled testimony"); *id.* at 316 (characterizing a violation of the Fifth Amendment as "introducing an inadmissible confession at trial"); *United States* v. *Hubbell*, 530 U.S. 27, 41 (2000) (making "derivative use" of compelled testimony "in obtaining the indictment against respondent and in preparing its case for trial" constitutes Fifth Amendment violation); *Estelle* v. *Smith*, 451 U.S. 454, 464-465 (1981) (using "as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination" constitutes Fifth Amendment violation); *Culombe* v. *Connecticut*, 367 U.S. 568, 581 (1961) (opinion of Frankfurter, J.) (Fifth Amendment protects witness against being made "'the deluded instrument of his own conviction'") (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)).

The court below "recognize[d]" this Court's description of the privilege in *Verdugo-Urquidez*, but disregarded the statement as merely "dicta to the contrary." Pet. App. 10a n.3. That is a debatable account even of *Verdugo-Urquidez* itself; after all, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). The Ninth Circuit has elsewhere defined "dictum" as a statement in an opinion that is "peripheral" and that as a result "may not have received the full and careful consideration of the court that uttered it." *Ponderosa Dairy* v. *Lyons*, 259 F.3d 1148, 1155 (2001), petitions for cert. pending, Nos. 01-950 and 01-1018. That is an odd way to describe a portion of the *Verdugo-Urquidez* opinion that this Court introduced with the remark "we think it

significant to note" (494 U.S. at 264). And even statements that are "'technically dicta'" but are "'an important part of the Court's rationale for the result that it reache[s]'" are "'entitled to greater weight.'" *Seminole Tribe*, 517 U.S. at 67 (quoting *Sheet Metal Workers*, v. *EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring)).

In any event, *Verdugo-Urquidez* simply summarized the meaning of the Fifth Amendment as elaborated in numerous other decisions of this Court. Those cases have made abundantly clear that the privilege against compulsory self-incrimination is not violated without the actual use of compelled testimony against the witness in a criminal case. The Court's testimonial immunity cases make the point most emphatically. Indeed, the Court in *Verdugo-Urquidez* cited the leading testimonial immunity case, *Kastigar* v. *United States*, 406 U.S. 441 (1972), in support of its description of the metes and bounds of the Fifth Amendment. See 494 U.S. at 264.

The question in *Kastigar* was whether a witness who was compelled to testify before a grand jury under a grant of use immunity pursuant to 18 U.S.C. § 6002 could invoke the privilege against compulsory self-incrimination. The Court held that he could not. "[I]mmunity from use and derivative use" of compelled testimony, the Court reasoned, "is coextensive with the scope of the privilege against self-incrimination." 406 U.S. at 453. Accordingly, the Court explained, use immunity, once conferred on a witness, "is sufficient to compel testimony over a claim of privilege." *Ibid.* The "*sole* concern" of the privilege, the Court made clear, "is to afford protection against being forced to give testimony *leading to the infliction of penalties affixed to * * * criminal acts*." *Ibid.* (emphasis added and internal quotation marks omitted).[4]

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[4] See also *Wilkins* v. *May*, 872 F.2d 190, 194 (7th Cir. 1989) ("The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case – otherwise, immunity statutes would be unconstitutional."); Mark A. Godsey, Miranda's *Final Frontier – The*

Kastigar confirms that mere coercion, even when it succeeds in eliciting otherwise incriminating statements, does not violate the Fifth Amendment without the actual use of the statements against the witness in a criminal case. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) – on which *Kastigar* relied (406 U.S. at 455-459) – makes the same point in a slightly different context.

In that case, witnesses who had been subpoenaed to testify in certain state proceedings invoked the Fifth Amendment and refused to answer questions, despite the grant of immunity under state law. The witnesses contended that, while the immunity grant might protect them from *state* prosecution, nothing in the applicable state immunity statutes purported to relieve them of *federal* prosecution. This Court held that the witnesses could be compelled to answer the Waterfront Commission's questions.

The Court explained that, even if the state immunity statutes did not cover federal prosecution, the Fifth Amendment itself ensured that the witnesses would be immune from federal prosecution. "This exclusionary rule," the Court stated, "while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness

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International Arena: A Critical Analysis of United States v. Bin Laden, *And a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1724 (2002) ("[I]f a law enforcement officer were to use brute force and torture to extract an involuntary confession from a suspect, the officer would not at that time have violated the privilege because the suspect would not yet have testified against himself at trial. * * * This distinction is made clear in the line of federal cases dealing with governmental grants of immunity to witnesses."); Steven D. Clymer, *Are Police Free to Disregard* Miranda?, 112 YALE L.J. ___, ___ (forthcoming December 2002) (Section I.A.2) ("Immunity doctrine thus demonstrates that the privilege permits compulsion; it only imposes later restrictions on the government when it compels answers.").

had claimed his privilege in the absence of a state grant of immunity." 378 U.S. at 79.

The "coercion" in the immunity cases derives from a subpoena backed by the power of contempt, rather than from acts of physical or psychological intimidation. But that is if anything *more* reason why the immunity cases preclude any argument that the government violates the Fifth Amendment when compelling testimony without using it. After all, as the Court has explained, "[t]estimony given in response to a grant of * * * immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

Time and again, the Court has made the same point: So long as the government makes no use (direct or derivative) of a compelled statement in a criminal case, a witness's Fifth Amendment rights have not been violated. This Court's Fifth Amendment "penalty cases" (*Minnesota* v. *Murphy*, 465 U.S. at 434) illustrate the proposition as well. "In each of the so-called 'penalty' cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Ibid.* (quoting *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977)).[5] The Court has generally struck down the penalties as violations of the Fifth Amendment. See, *e.g.*, *Lefkowitz* v. *Cunningham*, 431 U.S. at 806-809 (invalidating state law that divested attorney of a state political office for declining to waive Fifth Amendment protections); *Lefkowitz* v. *Turley*, 414 U.S. at 82-85 (invalidating state law that precluded government contractors from secur-

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[5] See also Clymer, *supra*, 112 YALE L.J. at ___ (Section I.A.3).

ing future awards in the event of a refusal to waive Fifth Amendment protections).

In each instance, however, the Court emphasized that, so long as the witness is immunized against the use of his statements in a subsequent prosecution, neither compulsion nor penalties would violate the Fifth Amendment:

> We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, *the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use*. *Kastigar* v. *United States*, [406 U.S. at 446]. Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment.

Lefkowitz v. *Turley*, 414 U.S. at 84 (emphasis added).

The Court has made the same point in many other cases. In *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 561-562 (1990), the Court held that a witness could not decline, on Fifth Amendment grounds, to answer questions about the whereabouts of a child, but that the Fifth Amendment was available in the event she was later prosecuted, at which point there may be "limitations upon the direct and indirect use of that testimony." See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 316 (1976) ("if inmates are compelled in [prison disciplinary] proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to 'waive such immunity'") (quoting *Lefkowitz* v. *Turley*, 414 U.S. at 85); *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002) ("[i]f the State of Kansas offered

immunity, the self-incrimination privilege would not be implicated"); cf. *Simmons* v. *United States*, 390 U.S. 377, 393-394 (1968) (because a criminal defendant is effectively "compelled" to testify at a suppression hearing, for fear that not doing so will prejudice his chances to vindicate Fourth Amendment rights, any testimony he gives at such a hearing will be immunized against use at the subsequent criminal trial).

The Ninth Circuit's construction of the Fifth Amendment – according to which it may be violated by coercive questioning alone – simply cannot be squared with these testimonial immunity cases and penalty cases. Nor can the panel's novel ruling be reconciled with this Court's recent decision in *United States* v. *Balsys*, 524 U.S. 666 (1998).

The witness in that case was subpoenaed by the Office of Special Investigations of the Department of Justice. That Office was investigating whether the witness had participated in Nazi persecution during World War II and was therefore subject to deportation. The witness resisted the subpoena, contending that his answers would subject him to foreign prosecution, allegedly in violation of the Fifth Amendment.

This Court agreed with the witness that he was being "compelled" to testify and that he would thereby become a "witness against himself." 524 U.S. at 671. The Court held, however, that prosecution by another country does not constitute a "criminal case" for Fifth Amendment purposes. Because there was therefore no "risk that [the witness's] testimony will be used in a proceeding that is a 'criminal case'" (*ibid.*), the Fifth Amendment could not be invoked.

Significantly, the Court rejected the very rationale on which the Ninth Circuit relied in this case. In the court of appeals' view, the Fifth Amendment must be broadly construed in order to guard against interrogation practices that are "'destructive of human dignity.'" Pet. App. 9a (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 457-458 (1966)). The defendant in *Balsys* made the same claim: that "'our respect for the inviolability of the human personality'" requires that the Fifth Amend-

ment be construed to encompass fear of foreign prosecution.

This Court emphatically disagreed. Were this "inviolability" rationale correct, the Court reasoned, then a violation of the Fifth Amendment – like a violation of the Fourth Amendment – would be "complete at the moment of illicit intrusion, whatever use may or may not later be made of their fruits." 524 U.S. at 692.[6] "The Fifth Amendment tradition, however, offers no such degree of protection. If the Government is ready to provide the requisite use and derivative use immunity, * * * the protection goes no further: no violation of personality is recognized and no claim of privilege will avail." *Ibid.* In short, the Court stated (quoting *Verdugo-Urquidez*), ""the Fifth Amendment is a fundamental *trial right* of criminal defendants."" *Id.* at 692 n.12. Not until a compelled statement is used against the witness in a (domestic) criminal trial has the Fifth Amendment been violated.

Indeed, precisely because the Fifth Amendment privilege is a *trial right* – designed to promote the fairness of criminal trials – this Court declined to extend the rule in *Stone* v. *Powell*, 428 U.S. 465 (1976), to allegations that a statement was obtained in violation of *Miranda*. See *Withrow* v. *Williams*, 507 U.S. 680 (1993). *Stone* precludes the raising of Fourth Amendment claims in federal habeas review, recognizing that the exclusionary rule is designed simply "to deter future Fourth Amendment violations." 507 U.S. at 686. If, however, a constitutional claim addresses "'the fairness, and thus the legitimacy, of our adversary process'" (*id.* at 688), the rule in *Stone* will not apply.

Unlike the Fourth Amendment, which protects privacy, the Fifth Amendment does *not* "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow*, 507 U.S. at 692. Rather, the privilege against compulsory self-incrimination "serves to guard against 'the *use* of unreliable state-

[6] For this proposition, the Court cited the very passage of *Verdugo-Urquidez* that the Ninth Circuit disregarded as "dicta." See 524 U.S. at 692.

ments *at trial*.'" *Ibid.* (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966) (emphasis added)). Thus, because the Fifth Amendment, including the "prophylactic" rules of *Miranda*, "safeguards 'a fundamental *trial* right'" (*id.* at 691 (quoting *Verdugo-Urquidez*; emphasis in *Withrow*)), *Stone* does not bar the raising of Fifth Amendment claims in federal habeas review. This is further proof – if any were needed – that the *Verdugo-Urquidez* "dictum" correctly summarizes this Court's entire self-incrimination jurisprudence and shows that the Constitution really does mean what it says when it requires that a person be compelled "in a[] criminal case" to be a "witness" before there can be any Fifth Amendment violation.

* * * * *

In short, as the Court explained more than 100 years ago in *Brown* v. *Walker*, 161 U.S. 591, 600 (1896), this Court's Fifth Amendment cases "proceed upon the idea that the prohibition against [a witness's] being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure." In the absence of such a "detriment" – the actual *use* of a compelled statement against the witness in a criminal case – all the coercion in the world will not violate the Compulsory Self-Incrimination Clause. The Ninth Circuit's contrary view cannot be sustained.

2. The Interrogation Did Not Violate Respondent's Due Process Rights

a. The court of appeals held that "a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." Pet. App. 10a. That holding is wrong.

The Due Process Clause of the Fourteenth Amendment serves as a "protection of the individual against arbitrary action of government." *County of Sacramento* v. *Lewis*, 523 U.S. at 845. It therefore imposes various limits on a State's right to act. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125-127 & n.10 (1992). Of particular relevance here are two ways in

which the Fourteenth Amendment restricts governmental power and correspondingly protects individual rights.

First, the Fourteenth Amendment helps to ensure that an individual will not be deprived of liberty without a fair trial. *Brown* v. *Mississippi*, 297 U.S. 278, 285 (1936). That right includes a prohibition on the use at a criminal trial of involuntary confessions that largely overlaps with the protections of the Fifth Amendment privilege.

Second, under the doctrine known as "substantive due process," the Fourteenth Amendment limits the government's ability to infringe "fundamental liberty interests." *Reno* v. *Flores*, 507 U.S. 292, 301 (1993). That doctrine can include limitations on police brutality that shocks the conscience, *Rochin* v. *California*, 342 U.S. 165 (1951), perhaps including limitations on the infliction of physical or mental suffering through improper questioning techniques. Substantive due process, however, *permits* an imposition on protected interests when "'competing state interests * * * outweigh'" them. *Washington* v. *Harper*, 494 U.S. 210, 220 (1990) (quoting *Mills* v. *Rogers*, 457 U.S. 291, 299 (1982)).

The prohibition against the use of an involuntary confession is one of the guarantees inherent in the State's duty to conduct a fair criminal trial. The Ninth Circuit's error in this case, and in *Cooper* (see 963 F.2d at 1248), is that the court of appeals has transformed that protection into an independent "right to avoid coercive questioning," guaranteed by substantive due process. The Fourteenth Amendment, however, does not go so far. True, it prohibits (as does the Fifth Amendment) the use of an involuntary confession in a criminal case. *Dickerson* v. *United States*, 530 U.S. at 434 ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."); see also *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). But the Fourteenth Amendment does not give an individual a freestanding

– let alone an unqualified – "substantive right to silence." *Cooper*, 963 F.2d at 1248; see also Pet. App. 11a (referring to right "to be free from police coercion in pursuit of a confession").

In the seminal case of *Brown* v. *Mississippi*, this Court explained that the prohibition on coerced confessions is grounded in the State's duty to conduct a criminal trial in a manner consistent with traditional notions of justice. The question there was whether convictions that rested on confessions "extorted * * * by brutality and violence" were consistent with due process. 297 U.S. at 279. The Court began its analysis by noting:

> The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

Id. at 285 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)). Thus, the Court reasoned, "the rack and torture chamber may not be substituted for the witness stand." *Id.* at 285-286. Nor may "an accused * * * be hurried to conviction under mob domination." *Id.* at 286. Turning to the admissibility of an involuntary confession, the Court concluded that "the trial is equally a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." *Ibid.* The *use* of the confessions therefore "was a clear denial of due process." *Ibid.*

The Ninth Circuit in *Cooper* v. *Dupnik* cited *Brown* for just the opposite of the proposition for which it actually stands. According to the Ninth Circuit, this Court "in 1936 established clearly and beyond anyone's misapprehension the proposition that the Constitution, as a limit on the behavior of government officials, flatly prohibits coercion in the pursuit of a statement from a person suspected of a crime." 963 F.2d at 1244. Yet the passage the court immediately proceeded to quote, supposedly in support of that statement, says: "'Coercing the supposed state's criminals into confessions *and using such confessions so coerced from them against them in trials* has been the curse of

all countries.'" *Brown*, 297 U.S. at 287 (emphasis added) (quoting *Fisher* v. *State*, 145 Miss. 116, 134, 110 So. 361, 365 (1926)), *quoted in Cooper*, 963 F.2d at 1244. Inexplicably, the Ninth Circuit claimed it to be "clear in this passage" that "the due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself." 963 F.2d at 1244-1245.

Subsequent decisions of this Court have confirmed that the constitutional concern is the effect of coerced confessions on the criminal trial process. The Court has therefore framed the issue as "whether there has been a violation of the due process clause of the Fourteenth Amendment *by the introduction* of an involuntary confession." *Reck* v. *Pate*, 367 U.S. 433, 435 (1961) (emphasis added). And recently, in *Dickerson* v. *United States*, the Court discussed its "cases based on *the rule against admitting coerced confessions*." 530 U.S. at 433 (emphasis added); see *id.* at 435 n.1 (noting that they are based on the right to "a fair trial free from coerced testimony"). See also *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964) ("It is now inescapably clear that the Fourteenth Amendment forbids *the use* of involuntary confessions * * *.") (emphasis added); *Beecher* v. *Alabama*, 408 U.S. 234, 237 (1972) ("Under the due process clause, *no conviction tainted by a confession* so obtained can stand.") (emphasis added). This Court has therefore described the defendant's interest *not* as the right to be free of coercive interrogation, but instead as the "right to be *free of a conviction* based upon a coerced confession." *Jackson*, 378 U.S. at 377 (emphasis added) (invalidating New York procedure for determining voluntariness of confession because it could not "withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment").

Consistent with these precedents, *every* authority on which the Ninth Circuit relied both here and in *Cooper* for the proposition that coercive interrogation alone violated the Fourteenth Amendment (see Pet. App. 7a-8a, 10a-11a; 963 F.2d at 1244-1249) addressed the use at a criminal trial of a coerced confession, not a freestanding right to be free from police

questioning.[7] Indeed, in every case but one we have found in which this Court has addressed the voluntariness of a confession, the issue was whether that confession could be used against the defendant at a criminal trial.

The one exception is Justice Brandeis's opinion for a unanimous Court in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923), which addressed the admissibility of an involuntary confession in a *civil* trial. Far from supporting the Ninth Circuit's thesis that a due process violation occurs without the introduction of an involuntary confession in a criminal trial, *Bilokumsky* undermines that thesis by holding that the Constitution *permits* the introduction of involuntary confessions in civil trials: "since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application." *Id.* at 157; accord *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation proceeding.") (citing *Bilokumsky* and other cases).

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[7] See *Brown*, 297 U.S. at 279 (discussing whether conviction may be based on confession "extorted" by "brutality and violence"); *Miller* v. *Fenton*, 474 U.S. 104, 109-110 (1985) (discussing admissibility of involuntary confession); *Mincey* v. *Arizona*, 437 U.S. 385, 396 (1978) (holding that involuntary statements could not be used against defendant at criminal trial); *Davis* v. *North Carolina*, 384 U.S. 737, 752-753 (1966) (observing that coerced confessions are "constitutionally inadmissible in evidence"); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (addressing admissibility of involuntary confession); *Lynumn* v. *Illinois*, 372 U.S. 528, 537-538 (1963) (reversing conviction secured by admission of coerced confession as violative of due process); *Blackburn* v. *Alabama*, 361 U.S. 199, 211 (1960) (holding that admission of involuntary confession violates due process); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959) (reversing conviction based on introduction of coerced confession); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 155 (1944) (reversing conviction based on coerced confession).

Accordingly, this Court's voluntariness cases stand only for the limited proposition that the Fourteenth Amendment bars the use at a criminal trial of a confession that is the product of coercion. They do not, as the Ninth Circuit claimed, hold that an individual has a right "to be free from police coercion in pursuit of a confession." Pet. App. 11a.

The constitutional right at issue is a fair-trial right, not a freedom-from-interrogation right. It is both facile and quite wrong to think of suppression of evidence as merely a "remedy" for the constitutional violation (Pet. App. 8a n.2), rather than – as required by this Court's decisions – to think of admission of evidence in a criminal case as an indispensable part of the constitutional violation itself.

Nor – those precedents aside – would it make any sense to say that the Due Process Clause of the Fourteenth Amendment forbids all governmental coercion of involuntary statements, aside from the use to which the compelled statements are put. *Kastigar* v. *United States* and the other testimonial immunity precedents would become dead letters under such a holding, no less than they would under a holding that the Fifth Amendment privilege against compelled self-incrimination operates in this manner.

If the Fourteenth Amendment forbids all coercion at the state and local level, then the Fifth Amendment's Due Process Clause forbids all coercion at the federal level too, and a grant of testimonial immunity cannot solve the problem. All a federal witness needs to do to avoid testifying despite a grant of use immunity, then, is to invoke the Due Process Clause rather than the Compulsory Self-Incrimination Clause of the Fifth Amendment. But that cannot possibly be the right analysis, especially in light of the open-ended and flexible analysis typical of due process. See *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997); *Medina* v. *California*, 505 U.S. 437, 443 (1992); *Poe* v. *Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

One can easily imagine a situation in which a rational conception of the Due Process Clause – and one entirely consistent

with this Court's precedents – would require suppression of a confession from the criminal trial as "involuntary" and yet would not condemn, under substantive due process analysis, the police officers who coerced the confession. Suppose John Doe suspect has been arrested for kidnaping a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out on his life. A police officer (without physical violence) threatens, cajoles, and pressures John Doe into confessing to the kidnaping and disclosing the whereabouts of the child. His will overborne, John Doe confesses and the child is rescued.

May John Doe's confession be used in his subsequent criminal trial? No. It is involuntary, and due process will not permit the trial to be "tainted by a confession so obtained." *Beecher*, 408 U.S. at 237.[8] May John Doe sue the government under Section 1983 for a Fourteenth Amendment violation? The answer should also be no. He has no liberty interest in inhibiting the investigation of a serious crime and, even if he did, that interest is outweighed by the government's interest in solving the crime and saving the victim. Nothing in this Court's due process jurisprudence even remotely suggests that the child's life must be sacrificed to protect some interest of John Doe's beyond his right not to have an involuntary confession *used* against him.

b. The foregoing analysis shows that the Ninth Circuit was misguided in concluding that any action that requires suppression of evidence must necessarily constitute a due process violation even when there is no attempt to introduce a confession at a criminal trial. But we need not and do not argue in this

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[8] But cf. *Leon* v. *Wainwright*, 734 F.2d 770, 773 & nn.5-6 (11th Cir. 1984) (although police used physical force to learn where a suspect was hiding the victim of his kidnaping, a subsequent statement, made after a sufficient "break in the chain of events," was admissible), *cited in* A. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 135, 247 n.3 (2002).

case that the Fourteenth Amendment places absolutely *no* limits on police questioning in the absence of use of the statements thereby obtained. Rather, this Court's substantive due process jurisprudence is broad enough to condemn certain police questioning tactics outright – but *only* if they are intentional, brutal, and unjustified by legitimate state interests. See *Wilkins* v. *May*, 872 F.2d at 195 ("We do not undertake to specify a particular threshold, a task that may well exceed our powers of articulation. But it is a high threshold, and to cross it Wilkins and plaintiffs like him must show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.").

i. The "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right." *Flores*, 507 U.S. at 301. See also *County of Sacramento* v. *Lewis*, 523 U.S. at 841 n.5. It protects only a narrow category of rights: As Justice Stevens observed for a unanimous Court, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. In other words, "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.*; accord *Flores*, 507 U.S. at 302. This Court's "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense, thereby recognizing the point made in different circumstances by Chief Justice Marshall, that it is a *constitution* we are expounding." *County of Sacramento* v. *Lewis*, 523 U.S. at 846 (internal quotations and citations omitted, emphasis in original).

What right, then, is respondent claiming was violated by Chavez's interrogation? There is no evidence that petitioner hit, beat, or otherwise caused any physical harm to respondent. Nor is there any evidence that petitioner's conduct exacerbated

respondent's injuries, or prolonged his stay in the hospital. To the contrary, the Ninth Circuit found it undisputed in the record that emergency personnel treated respondent and that petitioner ceased his questioning to permit tests and other procedures to be performed. Pet. App. 4a.[9]

Indeed, the record is devoid of any evidence that petitioner's conduct had any tangible effect on respondent other than eliciting answers to questions. Instead, the right asserted by petitioner encompasses nothing more than respondent's wish to be left alone as he suffered from preexisting injuries. As described by the Ninth Circuit, it is simply the "right to be free of police coercion" (Pet. App. 11a), or the "right to silence." *Cooper*, 963 F.2d at 1248.

In concluding that such a "right" is one of the categories of interests protected by the Fourteenth Amendment, the Ninth Circuit broke new ground. This Court has never held that police questioning alone – whether wanted or not, whether coercive or not – infringes a fundamental liberty interest protected by the Fourteenth Amendment. And to do so would extend the reach of the Due Process Clause far beyond anything this Court has ever considered appropriate.

Although it has been held that an extreme act of physical violence to a person, such as pumping a suspect's stomach to obtain evidence, will violate due process if it "shocks the conscience" (*Rochin*, 342 U.S. at 172), not every police action that may harm or offend an individual implicates the Fourteenth Amendment. See *Schmerber* v. *California*, 384 U.S. 757, 760 (1966) (distinguishing *Rochin*); *Breithaupt* v. *Abram*, 352 U.S. 342, 436-437 (1957) (same).[10] Rather, "[t]he relevant liberty is

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[9] Although respondent alleged in his pleadings that petitioner interfered with his medical treatment, the record establishes otherwise (see, *e.g.*, C.A. App. 90, 115, 271, 272), and both the district court and the court of appeals recognized that medical personnel treated respondent throughout Chavez's questioning. Pet. App. 4a, 18a.

[10] In a different context, the Court unanimously reiterated in *Collins* v. *Harker Heights*, 503 U.S. at 128, that what matters for purposes of

not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation." *Wilkins* v. *May*, 872 F.2d at 195 (emphasis added).

In *Bowers* v. *Hardwick*, this Court rejected the argument that the Due Process Clause includes a fundamental right to engage in homosexual sodomy. 478 U.S. 186, 191 (1986). The Court noted that, when announcing rights not readily identifiable from the Constitution's text, "the Court has sought to identify the nature of the rights qualifying for heightened judicial protection" including only those "that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Id.* at 191-192 (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937)). "[F]undamental liberties" comprise only "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers*, 478 U.S. at 192 (quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977)).

The "right" to be free of police questioning is not "deeply rooted in this Nation's history and tradition." Indeed, quite the opposite is true. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U.S. at 477-478. See also *New York* v. *Quarles*, 467 U.S. 649, 665 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (describing duty to aid law enforcement as a "deeply rooted social obligation"). It is therefore permissible to consider, as one factor in sentencing, a defendant's refusal to cooperate with a criminal investigation. "This deeply rooted social obligation [to report criminal behavior] is not diminished when the witness to [the] crime is involved in the illicit activities himself." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980). "Unless his silence is protected by the privilege against self-

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substantive due process is whether the conduct at issue "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."

incrimination * * * the criminal defendant no less than any other citizen is obliged to assist the authorities." *Ibid.* Indeed, the first Congress of the United States made it a crime for any person "who, 'having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority." *Ibid.* (quoting Act of Apr. 30, 1790, § 6, 1 Stat. 113) (brackets in original). See also *id.* at 558 n.5 (discussing modern version of statute, 18 U.S.C. § 4).

Accordingly, what is deeply rooted in this tradition is *not* the right to be silent in the face of police questioning, but instead the duty to respond to those questions. It would be anomalous to hold that an individual has a "fundamental right" under the Fourteenth Amendment to refrain from engaging in conduct described by this Court as a "deeply rooted social obligation" of every citizen.

ii. Even if the Ninth Circuit were correct that respondent had been deprived of a cognizable liberty interest in being free of police questioning, there is no allegation here that petitioner acted with the requisite level of intent.[11] In *County of Sacramento* v. *Lewis*, this Court held that there was no Section 1983 claim based on a violation of the Fourteenth Amendment against an officer involved in a high-speed police chase, which resulted in the death of a passenger, unless it was shown that the officer acted with the intent to harm the victim. The Court rejected the contention that it would be sufficient to show "deliberate indifference." 523 U.S. at 851.

Contrasting a police chase with prison administration (as to which the "deliberate indifference" standard does apply), the Court recognized that "the police on an occasion calling for fast

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[11] In this respect, the Ninth Circuit went far beyond even its own *Cooper* v. *Dupnik* precedent, which cited and relied on abundant evidence of harmful intent by the questioning officers and noted that they made no claim of exigency to justify their questioning. 963 F.2d at 1223, 1224, 1225, 1226, 1229, 1232, 1236, 1237, 1238, 1243, 1248, 1249, 1250.

action have obligations that tend to tug against each other." 523 U.S. at 853. "They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *Ibid.* (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986)). Accordingly, "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Ibid.* (quoting *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986)).

Like the officers involved in a high-speed police chase (or prison guards attempting to quell a riot (see *Whitley*, 475 U.S. 312)), petitioner here was dealing with a fast-moving situation, in haste, and under pressure. He was questioning the only non-police witness to an officer-involved shooting, who he thought (as did the witness) would die, and would do so soon. C.A. App. 452-453. Yet there is no allegation that petitioner intended to harm respondent.

The complaint states only that petitioner "with deliberate indifference interfered with the medical assistance to [respondent]." Am. Cplt. ¶ 13;[12] see also *id.* ¶ 17 (defendants, "with deliberate indifference," subjected respondent to cruel and unusual punishment). The only motive or intent alleged is petitioner's "motive to extort a statement from [respondent]" (*id.* ¶ 13) and petitioner's "motive to conspire with and protect" the officers. *Id.* ¶ 17. Under *County of Sacramento* v. *Lewis*, however, the requisite intent is the intent *to harm the victim*.[13] There is no

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[12] Although the complaint alleges that petitioner interfered with respondent's medical treatment, there is no evidence in the record to that effect, nor did the Ninth Circuit rely on an interference with medical treatment as the basis for a due process claim.

[13] The Court also briefly noted that an intent "to worsen [a suspect's] legal plight" might suffice to show a violation of the Fourteenth Amendment. 523 U.S. at 854. This phrase, it seems, is explained later in the opinion where the Court stated that the "officer's instinct was to do his job as a law enforcement officer, *not to induce [the suspect's] lawlessness*." *Id.* at 855 (emphasis added). Here, too, Chavez's instinct was to do his duty as a law enforcement officer to gather evidence (see C.A. App. 452), not to "induce" any "lawlessness" on the part of respondent, who was of course incapacitated.

allegation or evidence of such an intent here. Accordingly, petitioner did not have the mental state required to commit a violation of the Fourteenth Amendment.

iii. There is still a third infirmity (and this one may be the gravest) with respondent's Fourteenth Amendment claim. In every substantive due process case, the infringement of a liberty interest must be balanced against the governmental interest in engaging in the infringing conduct. "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg* v. *Romeo*, 457 US. 307, 321 (1982)); see also *Washington* v. *Glucksberg*, 521 U.S. at 767-770 (Souter, J., concurring in the judgment).

For example, although there is indisputably a liberty interest in bodily integrity (see *Ingraham* v. *Wright*, 430 U.S. 651, 674 & n.14 (1977)), that right cedes to the State's interest in collecting evidence in certain situations (see *Schmerber*, 384 U.S. at 770) as well as to the State's interest in protecting a mentally ill prisoner from himself and others. See *Washington* v. *Harper*, 494 U.S. 210, 223-225 (1990) (medicating prisoner against his will). Because both the district court and the Ninth Circuit believed that the precedents addressing the use of a coerced confession in a criminal proceeding dispositively resolved the Fourteenth Amendment claim (see Pet. App. 10a-11a, 23a), however, neither court addressed the governmental interest involved in Chavez's conduct.

But the legitimate and compelling state interests in questioning respondent are readily apparent. Petitioner was investigating an officer-involved shooting. He was attempting to obtain a statement from the only non-police witness to that shooting – the victim – who everybody believed was about to die. Chavez therefore believed (and quite reasonably so) that, if he did not take respondent's statement immediately, the statement would be permanently lost.

Of course, there is an "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973); see also *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (same). And that need sometimes overrides a suspect's desire not to be interrogated.

In *In re Groban*, 352 U.S. 330 (1957), the appellants raised a due process challenge to an Ohio statute governing the investigation of fires. The statute was designed to allow "the expeditious and expert ascertainment" of the cause of a fire by "the chief guardian of a community against the hazards of fires." *Id.* at 336 (Frankfurter, J., concurring). One aspect of the statute was to permit the Fire Marshal to conduct private hearings excluding any person, including lawyers for the witnesses. *Id.* at 331.

The Court rejected the appellants' claim that the statute violated the Due Process Clause by depriving them of the assistance of their counsel. Analogizing the case before it to grand jury proceedings, where a witness has no right to counsel, the Court held that "[t]here is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire." 352 U.S. at 333. *Groban*, then, teaches that the government's interest in investigating a crime or threat to public safety may override an individual's interest in not cooperating with that investigation.

So too does *New York* v. *Quarles*, *supra*. There, a police officer followed a rape suspect into a supermarket and, upon apprehending the suspect, frisked him and discovered that his gun holster was empty. The officer asked the suspect where the

gun was. The suspect told him, and, at the subsequent criminal trial, the suspect's statement was excluded because the officer failed to give *Miranda* warnings before asking for the location of the gun. This Court held that the evidence was admissible:

> [I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. * * * Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

467 U.S. at 657. The Court therefore concluded that "the need for answers" in that situation "outweigh[ed]" the need for *Miranda* warnings. *Ibid.*

Chavez had every legitimate interest in investigating whether there had been police misconduct in the shooting of Martinez. See, *e.g.*, *Driebel* v. *City of Milwaukee*, 298 F.3d 622, 644 (7th Cir. 2002) ("A police officer may be guilty of committing a battery by using unreasonable force in the apprehension of a suspect. * * * [W]e are convinced that the [Police] Department conducted a legally adequate inquiry by interviewing the victim, Joshua Schmidt, as well as numerous witnesses * * *."); *Moran* v. *Clarke*, 296 F.3d 638, 647-648 (8th Cir. 2002) (en banc) ("the serious business of weeding out police abuses" and the officers' interest in accurate factual determinations are both of constitutional significance). See generally *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976) (recognizing importance of, and lack of warrant for federal interference with, "the internal procedures of the Philadelphia police department" to investigate possible police misconduct). Indeed, Martinez asserts – in the claims that remain pending in the district court – that there *was* police misconduct. There is no reason why the constitutional analysis should entirely disregard the legitimate interest in gathering evidence that could support or refute that assertion.

This interest in investigating crime and possible police misconduct is particularly compelling when – as was the case here

– there is a serious risk that evidence will be lost. In the Fourth Amendment context, an otherwise unconstitutional search may be permissible when there is a risk that evidence will be destroyed. A blood test may be taken – even against the suspect's will – if the "officer * * * might have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Schmerber*, 384 U.S. at 770 (internal quotation omitted). And the police may conduct a search without a warrant when there is a risk that the suspect will destroy the evidence of illegality. See *Ker* v. *California*, 374 U.S. 23, 41-42 (1963); see also *Mincey*, 437 U.S. at 394 (recognizing that risk that evidence might be lost or destroyed constitutes "exigent circumstances").

Just like the substantive due process component of the Fourteenth Amendment, the Fourth Amendment requires "a careful balancing of the nature and quality of the intrusion on the individual's * * * interests against the countervailing governmental interests at stake." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). If the risk of destruction of evidence is a sufficient justification to render an otherwise unreasonable search permissible under the Fourth Amendment, it logically follows that is a sufficiently compelling reason to outweigh any interest respondent may have had in resisting police questioning for purposes of the Fourteenth Amendment. There can be no doubt that petitioner "reasonably believed" (*Schmerber*, 384 U.S. at 770) that evidence might be lost: all indications were that respondent would die, and, unless Chavez took his statement in the emergency room, respondent's account of what happened would die with him. Accordingly, respondent's challenge to petitioner's conduct does not allege a violation of the Fourteenth Amendment.

B. If Respondent Sustained A Constitutional Deprivation At All, The Constitutional Rights At Stake Were Not "Clearly Established" At The Time Of The Interrogation

If, despite the foregoing analysis, respondent has made out a Fifth or Fourteenth Amendment violation in this case, "the next, sequential step is to ask whether the right was clearly established." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.* It is simple enough to say, for example, that police behavior that "shocks the conscience" violates the Due Process Clause, but "that is not enough." *Saucier*, 533 U.S. at 202. Rather, as the Court emphasized in *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added), "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right."

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 533 U.S. at 202 (emphasis added); accord *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"). Even if, as a "general proposition," it was clear that the Fifth or Fourteenth Amendment could *sometimes* be violated without actual use of a compelled statement or extreme police brutality, respondent would still have to show that, "in light of the specific context of the case," petitioner violated a "clearly established" right. *Saucier*, 533 U.S. at 202.

In the absence of a precedent precisely on point, that hurdle is especially difficult for a plaintiff to surmount in this context because no police officer can be expected to predict with perfect accuracy the after-the-fact judgments of courts. "The line

between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, especially in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused." *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963). See also *Dickerson*, 530 U.S. at 444 (quoting *Haynes*).

As we show below, respondent has utterly failed to show that petitioner's interrogation violated "clearly established" rights under either the Fifth or Fourteenth Amendments.

1. There Is No "Clearly Established" Fifth Amendment Right to Be Free From Coercive Questioning

For the reasons stated in Section A.1, it was "clearly established" at the time of Chavez's interrogation that – unless a compelled statement is actually used against the witness in a criminal case – coercive questioning is *not* a violation of the Fifth Amendment. But if we are wrong about that, surely the *opposite* proposition was not clearly established at the time. To the contrary, fully seven years before the interrogation in this case, this Court had said quite plainly that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Verdugo-Urquidez*, 494 U.S. at 264.

True, this may arguably have been "dicta" in *Verdugo-Urquidez*, as the panel pointed out. But see pages 14-15, *supra*. That legal nicety, however, is apt to elude police officers who, like petitioner, are charged with taking quick action in high-pressure environments. Such officers "are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *County of Sacramento* v. *Lewis*, 523 U.S. at 853. "Police officers are ill-equipped to pinch-hit for counsel" (*Oregon* v. *Elstad*, 470 U.S. at 316) and cannot be expected to discern whether a statement by this Court was essential to its holding, much less determine that Supreme

Court dicta should be ignored in favor of "binding precedent" of the court of appeals. Pet. App. 10a n.3.[14]

What is more, if petitioner had had an entire law library at his disposal, he might also have discovered that some circuits accord significant weight to this Court's dicta.[15] Indeed, Judge Calabresi has opined that "lucid and unambiguous dicta

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[14] In this case, petitioner's task would have been all the more daunting because, had he somehow thought to consult the en banc decision in *Cooper*, he would have found that only in connection with the substantive due process claim – but not in regard to the Fifth Amendment – did the majority consider whether the constitutional right "matur[es]" before any use is made of the compelled statement. Compare 963 F.2d at 1238-1244 (Fifth Amendment discussion) with *id.* at 1244-1250 (Fourteenth Amendment discussion).

[15] See, *e.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holding, particularly when the dicta [are] recent and not enfeebled by later statements"); *McCoy* v. *MIT*, 950 F.2d 13, 19 (1st Cir. 1991) (same); *Nichol* v. *Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("[t]his Court should respect considered Supreme Court dicta"). See also *Stone Container Corp.* v. *United States*, 229 F.3d 1345, 1349-1350 (Fed. Cir. 2000) ("[a]s a subordinate federal court, we do not share the Supreme Court's latitude in disregarding the language in its own prior opinions"), cert. denied, 532 U.S. 971 (2001); *Natural Resources Def. Council* v. *Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative"); *In re McDonald*, 205 F.3d 606, 612 (3d Cir.) ("we should not idly ignore considered statements the Supreme Court makes as dicta" since the Court "uses dicta to help control and influence the many issues it cannot decide because of its limited docket"), cert. denied, 531 U.S. 822 (2000). Indeed, petitioner might have discovered that the Ninth Circuit itself – at least in the absence of "binding" circuit precedent – accords "due deference" (*United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996)) to Supreme Court dicta and does not "lightly ignore" such portions of this Court's decisions (*Staacke* v. *United States Secretary of Labor*, 841 F.2d 278, 281 (9th Cir. 1988)).

concerning the existence of a constitutional right can without more make that right 'clearly established.'" *Wilkinson* v. *Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (concurring opinion). Whether or not that is so, surely lucid and unambiguous dicta concerning the *non*existence of a constitutional right must without more *preclude* a holding that the right is "clearly established."

What is more, had petitioner taken time to Shepardize or KeyCite the *Cooper* case, he would have discovered that the Ninth Circuit's ruling had been uniformly rejected by other circuits. See, *e.g.*, *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J., sitting by designation) (sustaining a defense of qualified immunity in a Section 1983 case founded on a Fifth Amendment claim and noting that the dissenters in *Cooper* made "persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case"); *Riley* v. *Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (rejecting Fifth Amendment claim, noting that, "[w]hile Fifth Amendment concerns can certainly be implicated prior to trial, the Supreme Court has declared that a Fifth Amendment violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself'"); *Giuffre* v. *Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994) (sustaining a defense of qualified immunity in Section 1983 case founded on a Fifth Amendment claim, noting that "[t]he dissenting judges in *Cooper* presented a persuasive argument that the Fifth Amendment privilege against self-incrimination is not violated until evidence is admitted in a criminal case"); *Wilkins* v. *May*, 872 F.2d at 194 ("The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted in a criminal case – otherwise, immunity statutes would be unconstitutional."); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992) (characterizing the rule embraced by the *Cooper* majority as "more capacious" than the Seventh Circuit had previously articulated); *United States* v. *Palomo*, 80 F.3d 138, 142 (5th Cir. 1996) (where defendant "has not

demonstrated that the Government has used any statements against him in these proceedings," he could not "demonstrate[] an actionable violation of his right against self-incrimination"). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. at 603.

2. There Is No "Clearly Established" Fourteenth Amendment Right To Be Free From Coercive Questioning, In General Or In The Circumstances Of This Case

As we showed above, if this Court were to conclude that it is a violation of the Fourteenth Amendment for a police officer to conduct an interrogation it would "break new ground" (*Flores*, 507 U.S. at 302), something this Court is "reluctant" to do when asked to recognize a new substantive due process right. *Collins*, 503 U.S. at 125. This Court has never held that a coerced confession, in and of itself, violates due process; to the contrary, it has found coerced confessions problematic *only* in the context of their admission into evidence. Against this backdrop – and especially in light of this Court's repeated statements emphasizing a citizen's duty to cooperate with a police investigation (see *Miranda*, 384 U.S. at 477-478) – it could not possibly be "clearly established" that the interrogation of respondent violated the Fourteenth Amendment.

Equally unthinkable is that it was "clearly established" that Chavez would shock the judicial conscience, and thereby violate the Fourteenth Amendment, by questioning respondent in the exigent circumstances of this case. Extreme police brutality – specifically, forcible stomach pumping to extract evidence – has been held to be so arbitrary and egregious that it "shocks the conscience." *Rochin* v. *California*, 342 U.S. at 172. But even the *Rochin* decision has not been extended to incidents of bodily injury, including blood tests on an unconscious suspect (*Breithaupt*, 352 U.S. at 436-437 (distinguishing *Rochin*)) and on a suspect who refused to consent (*Schmerber*, 384 U.S. at 760 (same)).

The Ninth Circuit also has limited the application of *Rochin*, holding that inserting a tube through a suspect's nose and forcing liquid through the tube into the suspect's stomach, so as to induce vomiting of narcotics, does not violate the Fourteenth Amendment. *Blefare* v. *United States*, 362 F.2d 870, 875-876 (9th Cir. 1966). Thus, what *was* "clearly established" at the time Chavez questioned respondent was that the battery of a suspect (unless extremely egregious) did not violate the Fourteenth Amendment. How then could a reasonable official know that conduct that does not even involve touching a suspect violates the Fourteenth Amendment under a "shocks the conscience" test?

The only precedent of which we are aware that could have alerted petitioner to particular circumstances in which interrogation alone *would* be held to violate the Fourteenth Amendment is *Cooper*, *supra*. But the coercive behavior referred to in that case was dramatically different from petitioner's conduct here in at least two material respects. First, the officers in *Cooper* were acting pursuant to a preconceived plan designed to keep the suspect off the witness stand at trial (rather than run the risk that his stationhouse statements would be used against him): "The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense * * *." 963 F.2d at 1249; see also *id.* at 1224. Second, it was conceded that the officers were not facing exigent circumstances. *Id.* at 1236.[16]

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[16] There are other marked differences between *Cooper* and this case. The interrogation in *Cooper* lasted four hours (963 F.2d at 1243), during which at least one of the interrogating officers determined that the suspect was in fact innocent. *Id.* at 1231-1232. And, perhaps particularly relevant for the inquiry into the existence of a due process right, Cooper *did* allege that he was deprived of a recognized property interest under the Fourteenth Amendment: he lost his job and was evicted from his residence. Cooper also established that he was traumatized by the encounter and later suffered post-traumatic stress syndrome. *Id.* at 1231.

Petitioner was operating in a fundamentally different environment than the officers in *Cooper*. Without a doubt, there were exigent circumstances here; respondent stated that he was dying and in fact appeared to be mortally wounded, so Chavez had no choice but to take the statement at the hospital or risk losing any chance for petitioner's version of events ever to be recorded. And Chavez could not possibly have been acting with a motive to keep respondent from testifying, as neither Chavez nor respondent believed that respondent would survive his injuries such that he would be able to testify in court. *Cooper* therefore did not give a reasonable officer acting "in haste [and] under pressure" (*Whitley* v. *Albers*, 475 U.S. at 320), attempting to obtain a dying declaration from a seemingly moribund witness with no preconceived plan to keep the witness from testifying, fair notice that his conduct could violate substantive due process.

Instead, a reasonable officer would have understood that "*Cooper* was decided under a highly-unusual set of facts." *Giuffre*, 31 F.3d at 1256. Ample precedent at the time of the events at issue here rejected – on facts involving far less justification for police questioning than Chavez had, and often far more aggressive questioning – the idea that police statements to, questions of, or even threats to an individual violated the Fourteenth Amendment.

Just 15 days before the Ninth Circuit en banc decided *Cooper*, for example, the Eighth Circuit rejected a Section 1983 claim based on a police officer's threat to knock the plaintiff's teeth out if the plaintiff refused to answer the officer's questions while he was placed alone in the back seat of a police car. "Although such conduct is not to be condoned, [the officer's] alleged conduct failed to rise to the level of a brutal and wanton act of cruelty." *Hopson* v. *Fredericksen*, 961 F.2d 1374, 1379 (8th Cir. 1992) (internal quotations omitted).

A reasonable officer reading *Cooper* and *Hopson* together would conclude either that *Cooper* turned on its unusual facts, or that the law in this area was so unsettled that *no* substantive due process right to be free of coercive police questioning could

predictably be applied to any particular factual setting. Either way, the officer who chose to go ahead with questioning, with justifications of exigency not present in *Cooper* (or *Hopson*) and without the aggravating factors of *Cooper* (or *Hopson*), could hardly be said to be on notice that he was violating "clearly established" substantive due process rights. See *Wilson* v. *Layne*, 526 U.S. at 603.

In *Yanez* v. *Romero*, 619 F.2d 851, 854-855 (10th Cir. 1980), the Tenth Circuit held that a threat to use a catheter if the defendant did not "voluntarily" produce a urine sample did not violate substantive due process. See *id.* at 854 ("[T]he *Rochin* decision pretty much stands by itself and is limited to its particular facts."). In *Robertson* v. *Plano City*, 70 F.3d 21 (5th Cir. 1995), two police officers went to a 16-year-old suspect's home, obtained his confession to a car burglary without giving him *Miranda* warnings, and admonished him – despite the alleged knowledge that the admonition was inaccurate – that he would face adult felony penalties even though he was a juvenile. *Id.* at 22. The 16-year-old committed suicide the next morning. *Ibid.*

Nevertheless, the court held that the complaint did not even state a claim for violation of substantive due process because the officers' alleged conduct "did not rise to the level of a 'brutal' and 'wanton act of cruelty.'" 70 F.3d at 25 (quoting *Hopson* v. *Fredericksen*, 961 F.2d at 1379). Again, no officer who studied the case law would conclude that a "clearly established" substantive due process right precluded questioning respondent to obtain what might be his dying declaration.

The Seventh Circuit reassured police officers in 1989 that in substantive due process analysis it would "*not* * * * suggest that the federal courts should or will undertake to monitor the details of police interrogations, and to award damages whenever the police cross the line that separates coercive from non-coercive interrogation." *Wilkins* v. *May*, 872 F.2d at 195 (emphasis added). Rather, "calculated" efforts to inflict "severe mental suffering" would be required before that court would recognize a substantive due process claim for police questioning

not involving the infliction of bodily harm. *Ibid.*[17] Thus, this Court's admonition in *Wilson* v. *Layne* is as relevant to respondent's claim under the Fourteenth Amendment as it is to his claim under the Fifth: when judges cannot agree on the constitutionality of a police practice, an officer cannot be held liable for misconstruing the law.

3. *Mincey* v. *Arizona* Did Not Clearly Establish That All Hospital Interrogations Constitute Fifth Amendment Or Substantive Due Process Violations Or That The Interrogation In This Case Constituted A Violation

The panel recognized that it was required to assess "the specific facts of this case" (Pet. App. 12a). In its view, however, petitioner should have known that he was violating respondent's constitutional rights since his interrogation of Martinez was, if anything, "more egregious" than the "virtually indistinguishable" interrogation that led this Court to exclude the confession in *Mincey* v. *Arizona*, 437 U.S. 385 (1978). But even if Chavez had had the time to engage in a "color-matching of cases" (*Reck* v. *Pate*, 367 U.S. 433, 442 (1961)) it is by no means "clear" that he should have determined that his interrogation landed on the wrong side of the line.

First and foremost, the holding of *Mincey* was that "statements obtained as these were cannot be *used* in any way against a defendant *at his trial*." 437 U.S. at 402 (emphasis added). As we have shown, it is not correct – and certainly not "clearly established" – that every precedent requiring exclusion of a statement from evidence on Fifth or Fourteenth Amendment grounds *ipso facto* requires the conclusion that the police violated the Constitution by obtaining such a statement. It is not to the exclusion cases, but to the civil actions asserting civil rights

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[17] *If* the decision in *Cooper* v. *Dupnik* was at all reconcilable with the larger body of federal case law, it is only because of the "shock the conscience" strand of analysis (963 F.2d at 1248-1250) and only because it *did* involve a calculated effort to inflict severe mental suffering. The present case does not share those characteristics.

claims, that a reasonable officer or the Ninth Circuit should have turned for guidance, and those cases as discussed above do not support the Ninth Circuit's conclusion. For that reason alone, *Mincey* should not have been deemed to place Chavez on notice that his interrogation violated the Constitution.

In any event, even if it were appropriate to read *Mincey* and other exclusion-of-statement cases as stating absolute standards for police conduct rather than prerequisites to admissibility, the Ninth Circuit's conclusion that this case is indistinguishable from *Mincey* would be wrong. Not only are there distinctions, but also those very distinctions have played a major role in the development of post-*Mincey* case law in the lower courts. And that is as it should be, considering that the relevant branch of analysis is the "open-ended" doctrine of substantive due process (*Collins*, 503 U.S. at 125) and the necessarily fact-specific "shocks the conscience" test.

Martinez was severely injured, just as Mincey was. But Mincey was subjected to "virtually continuous questioning" over a four-hour period. 437 U.S. at 396, 401. Here, respondent was questioned intermittently over a 45-minute time frame. Mincey was only occasionally coherent in his answers to questions, all of which he had to write down because tubes had been inserted in his throat and nose, making him unable to speak. *Id.* at 398-399. To make matters worse, Mincey's "responses" were especially unreliable because the officer "reconstructed" the interrogation by filling in the questions after the interview, with the answers already in front of him. *Id.* at 396 n.11. Martinez, though horribly injured, was responsive in his answers, showed no evident signs of coma, and was fully able to speak, albeit with great pain. In *Mincey*, even medical personnel had been impressed into urging Mincey to talk to the police. *Id* at 399. Respondent was questioned only by petitioner, without the involvement of medical attendants, who were present and treating him throughout the interrogation. Thus, it cannot truly be said that, compared to *Mincey*, it was "clearly established" that this interrogation violated substantive due process or the Fifth Amendment.

Court of appeals decisions rendered after *Mincey* (but before Chavez's investigation) would have given a reasonable officer even more reason to doubt that questioning respondent ran afoul of clear law. In at least four cases – three of which expressly distinguish *Mincey* – courts had held that statements made by suspects hospitalized for injuries were voluntary (and therefore admissible in court proceedings).

The Ninth Circuit held that the statements made by a defendant while he was in an emergency room, in critical condition, suffering from a drug overdose, and having recently recovered consciousness were admissible. *United States* v. *George*, 987 F.2d 1428, 1431 (9th Cir. 1993). The court distinguished *Mincey* because, among other things, Mincey was unable to speak and his answers were sometimes incoherent. *Ibid.* The Second Circuit concluded that statements made by a hospitalized defendant in significant pain, with "tubes running in and out of his body" and a "poor command of the English language," who was dizzy and subject to relentless questioning, were not the product of coercion. *Campaneria* v. *Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989). That court found *Mincey* inapplicable because, among other things, Mincey was unable to speak. The Ninth Circuit also concluded that statements made by a hospitalized patient in pain and under the influence of a pain-killing drug were admissible. *United States* v. *Martin*, 781 F.2d 671 (9th Cir. 1985). The *Martin* court distinguished *Mincey*, noting that Mincey could not talk, had received various drugs, and was questioned continuously for four hours. And in *United States* v. *Lewis*, 833 F.2d 1380, 1384-1385 (1987), the Ninth Circuit held that statements made by a suspect who had recently returned from surgery, and had just come out of a general anaesthetic, were voluntary.

On top of those distinctions, no one thought Mincey was dying and would therefore be unavailable for later questioning. On the contrary, after an afternoon shooting, and after Mincey's treatment, Detective Hust of the Tucson Police Department went to the intensive care unit "[a]t about eight o'clock that evening" and "continued to question him until almost mid-

night." 437 U.S. at 396. Mincey protested "that he could answer more accurately the next day." *Id.* at 400-401. "Let's rap tomarrow [*sic*]," Mincey wrote. *Id.* at 401 n.17. That is hardly a record suggesting exigency, in marked contrast to this case, in which respondent "told [Chavez] he believed he was dying eight times." Pet. App. 4a.

Persistent questioning of a seemingly dying witness may make judges (and many other people) squeamish, but that is not a constitutional violation, and unquestionably the possibility of the witness's imminent death creates a legitimate law enforcement interest in the preservation of evidence that was not present in *Mincey*. If petitioner indeed violated the Constitution, it can only be because that legitimate governmental interest does not outweigh respondent's liberty interest under a substantive due process analysis – *not* because the distinction is unworthy of *any* consideration in the analysis. Nor should a reasonable officer be expected to forecast that the courts would completely disregard this major distinction between Martinez's situation and Mincey's.

How, then, could Chavez have known in late 1997 that his questioning of respondent in an emergency room in an effort to preserve evidence was unconstitutionally "coercive," let alone brutal enough to "shock the conscience"? True, respondent was in pain. So were the defendants in *George*, *Campaneria*, and *Martin* – yet *none* of their statements was held to be involuntary. According to the *Martin*, *Campaneria*, and *George* courts, it was important that Mincey could not speak; respondent could. Respondent, like the defendant in *George*, was coherent; the *George* court distinguished *Mincey* on the ground that Mincey was not. Indeed, respondent was not under the influence of any medication that could affect his judgment or render his responses to questions particularly unreliable. The defendant in *Martin* was under the influence of a pain-killing drug, and the defendant in *Lewis* had just emerged from anaesthesia. But the Ninth Circuit ruled that both of their statements were voluntary. And respondent was questioned in his native language, Spanish; the defendant in *Campaneria*, on

the other hand, had little command of the English language, yet his statements, too, were held not to be the product of coercion.

In other words, even a "color-matching" of cases, and even one conducted under the Ninth Circuit's mistaken belief that admissibility precedents fully determine the constitutional issues in this case, would not have provided Chavez with clear guidance as to what constitutes permissible questioning in a hospital setting in exigent circumstances. It does not matter, for these purposes, whether a case could be made that respondent's statements were, in fact, involuntary. The relevant issue is whether petitioner, in his effort to obtain a dying declaration from a witness to a police shooting, violated a clearly established constitutional right. We submit that he did not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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IN THE

Supreme Court of the United States

BEN CHAVEZ,
Petitioner,

vs.

OLIVERIO MARTINEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

R. SAMUEL PAZ
Counsel of Record

LAW OFFICES OF R. SAMUEL PAZ

SONIA MERCADO

SONIA MERCADO & ASSOCIATES

520 South Grand Avenue
Biltmore Court – 7th Floor
Los Angeles, California 90071-2645
(310) 410-2981

Counsel for Respondent
OLIVERIO MARTINEZ

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

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QUESTIONS PRESENTED

1. Whether qualified immunity should be granted as a matter of law where Petitioner's argument depends upon facts that are not in the record or facts rejected by the lower courts.

2. Whether Petitioner is entitled to qualified immunity when engaged in a knowing violation of Respondent's constitutional rights by interrogating a physically and mentally incapable suspect with psychologically coercive techniques, after Respondent invoked his right to remain silent, until he had obtained a coerced statement.

3. Whether the fact that Respondent's coerced statement was not introduced in a criminal trial excuses Petitioner's deliberate violation of Respondent's constitutional rights.

4. Whether it is sufficient that Respondent demonstrated that Petitioner acted with "deliberate indifference" to his constitutional rights in order to maintain his constitutional claim.

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STATEMENT OF THE CASE

A. The Shooting of Oliverio Martinez

At approximately 7:00 p.m., on November 28, 1997, Officers Maria Peña and Andrew Salinas were investigating suspected narcotic activity at a shed near a vacant field located behind a residential area in a rural section of Oxnard, California. C.A.[1] 46:1-18; 47:3-16. They were questioning Eluterio Flores, a local farm field worker, (C.A.254:13-16; 255:5-8) but found no violation of any criminal law, (C.A.51:2-24; 52:1-20), nor any drugs, nor drug related materials in the shed or on Flores. C.A. 52:5-11; 60:12-17.

Oliverio Martinez, also a farm field worker, was heading home on his bicycle through a frequently used short cut. C.A. 79:20-25 to C.A. 80:1-13. As Martinez bicycled near the shed, Salinas heard his squeaky bike and yelled at him to stop. C.A. 206:19-22.

Peña and Salinas agree that Martinez was cooperative. He obeyed their command and parked his bike, put the kickstand down, and never spoke ill to Salinas, (C.A. 63:7-19), he just stood right by his bicycle. C.A. 64:3-8. He obeyed when the officer told him to place his hands behind his head. C.A. 57:17-20; 63:7-25 to C.A. 64:1-8; C.A. 79:10-16; 82:14-24. Salinas had no information that Martinez was involved in criminal activity or under the influence of drugs. C.A.71:18-21.

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[1] "C.A." refers to the "Court of Appeal Record," and "J.A." refers to "Joint Appendix."

While Salinas was searching Martinez, he felt a field knife and without warning he tackled him and threw him to the ground, falling on top of Martinez. C.A. 83:17-23. Martinez carried his work knife in a leather sheath which was used to cut strawberries, on the right side of his waist. C.A. 78:15-25. When Salinas was patting him down he did not see the knife. C.A. 62:2-6. Martinez had complied with every request and had not resisted. C.A. 63:1-6; 64:1-11. At no time did Martinez attempt to touch or to take his work knife out of his clothing. C.A. 66:9-11. Salinas first saw the knife after Martinez was shot and handcuffed with his hands behind his back. C.A. 62:7-13; 62:20-23. Martinez never made any aggressive or threatening movements toward the officers. C.A. 75:24-25; 76:1-25; 77:12-13; 58:13-16; and 59:20-25.

Officer Peña saw Martinez and Salinas fall to the ground and ran over to them. When she got there, Martinez was on all fours trying to get up, and Salinas was on his side. She attempted to get control of Martinez, but all three "kept falling and trying to get up again." (It is a rocky, grassy field.) C.A. 180:16-25. Peña observed that Martinez was not trying to cause injury to Salinas, nor "trying to fight meaning cause injury to officer Salinas." C.A. 190:14-17. She has no idea why "they were struggling," and when she tried to get a hold of Martinez, they all just kept falling." C.A. 180:16-25. Officer Peña pulled the work knife, still in the sheath, out of Martinez's waistband and threw it behind her. C.A. 181:3-5.

After the incident, Officers Peña and Salinas alleged that Martinez took Salina's holstered gun away from Salinas, and was pointing the gun at them. However,

Salinas testified that he never saw Martinez reach for his gun and take it out of his holster; that he never felt Martinez pull the gun out of his holster, (C.A. 69:13-18); and Salinas never saw Martinez point the gun at Peña. C.A. 49:1-7 ; C.A. 65: 23-25; 66:1; 68: 1-25; 69: 13-25; 70:1-2. Chavez testified in his deposition that "Salinas told him that Mr. Oliverio *tried* to take his gun and that Peña shot him." C.A. 102:21-22. Flores observed these events and testified that Martinez did not touch the gun or take the gun out of Salinas' holster and he never held it. C.A. 93:22-24; 94:1-25; 95:1-2. Martinez denies that he ever touched the gun or took the gun out of Salinas' holster or that he ever held it. C.A. 84: 4-10; 85: 16-18.

Salinas said that he shouted to Peña, "he's got a big f--- knife," (C.A. 204:16-17) but Peña testified that she did not hear this. Peña never saw Martinez strike Salinas and he never struck her. (C.A. 67:8-20.) Peña shot Martinez numerous times: one bullet entering the left side of Martinez's head, traversing behind both eyes and exiting the right eye orbit causing immediate blindness, the second bullet fractured the 12th rib and fractured the vertebra mid-back causing immediate paralysis, and several other bullets hit his right knee as he lay on the ground critically wounded. C.A. 16-18; 23:15-18; and 24:13-15.

B. The Coercive Interrogation

Petitioner Chavez had been on the force 16 years. (C.A. 98:20-25), and was one of the first officers to arrive at the scene of the shooting. C.A. 100:18-25; 101:1-10. Upon arriving he first met with officers Peña and Salinas. C.A. 100:7-9. When Chavez saw Salinas at

the scene, Salinas pulled the gun from the holster and removed it. C.A. 105:3-10. Chavez said it had blood, (C.A. 105:14-16), but there is no forensic evidence of Martinez's blood or his fingerprints on the gun. Chavez saw that Martinez was in police custody, there were no risks that he would escape, and he was "lying on his back and handcuffed." C.A.104:12-17. Chavez, Salinas, and Peña met and discussed the shooting and the story that Martinez had taken his gun away and was going to shoot them with it. C.A. 102:17-25; 103:1-25; 104:1-3 and 18-25; 105:1-2; 113: 6-10; 116:13-25; and 117:1-7.

Chavez's purpose for conducting an investigation was to *"find out first off if the crime had been committed";* and "to find the truth" and *"nothing else* that he could think of." C.A. 98:5-25 and 99:1-7, emphasis added. Chavez knew that Martinez was a "suspect," for the alleged crime of "attempting to kill a police officer." C.A. 368 ¶20. Chavez began to set up a crime scene perimeter, putting up yellow perimeter tape and clearing the crime scene of people. He instructed an officer to begin a crime scene log. C.A. 39 ¶3. Chavez testified that as Martinez laid in the field he "appeared to be injured." He "was shot in the head," and "both his eyes were swollen shut and he had blood coming from the side of his head." C.A. 107:19-20. Chavez heard Martinez saying that "he was hurting" and he heard him "definitely screaming" in pain, (C.A. 104:12-14; 106:19-25; and 107:4-20) and complaining of pain to the bottom portion of his body. C.A. 109:5-7. Chavez's assessment was that "he was not doing so good." C.A. 114: 9.

Chavez accompanied Martinez in the ambulance to the hospital in order to "obtain a statement from

Martinez." It was his purpose to "attempt to get a statement from him" and he was "still conducting this crime investigation." Chavez testified that he knew that Martinez was a "suspect," for the alleged "crime of attempting to kill a police officer." C.A. 368 ¶20. In the ambulance, Martinez was crying in pain and Chavez tried to get a statement but Martinez did not give a statement. Chavez continued to try to get information. C.A. 39, ¶ 5. Chavez knew the paramedics gave Martinez medication for his pain in the ambulance. C.A. 110:25 to 111:1-4. Chavez testified that he knew Martinez was not doing so good, and this meant to Chavez "that maybe *Martinez's mental capacities were not focused on giving a statement* regarding what had occurred." C.A. 114:9-18 and 374 ¶29, emphasis added. Chavez never gave him any Miranda warnings. C.A.113:17-21.

During the interrogation, Chavez knew Martinez was "in and out of consciousness." C.A. 40. Chavez testified and reported to his department that "the suspect [Martinez] continued not to give any statements until after he was given some type of medication in the emergency room," and that "*[a]fter being medicated,* Chavez approached the suspect and continued interrogating him." C.A. 110:4-21; 113:17-24; C.A. 40, emphasis added. "There were times in the emergency room when medical personnel would push me [Chavez] out of the room so they could work with Martinez." C.A. 115:10-12 & 240:10-12.

Chavez resumed the questioning but Martinez could not state his name nor remember his birth date. J.A. 7 & 8; C.A. 21. On the audiotape Martinez repeatedly answers, "I don't know what happened? (sic)" and even

when he cried in pain, "*Ay!* I am dying. *Ay!* What are they doing to me?" or moaned "I am choking," - Chavez continued, "Tell me, what happened." J.A.9; C.A 22.

Chavez testified that when the tape recorder was turned off it was because he was pushed out of the emergency room by the physicians. When he turned it back on Martinez's moans, "I am choking," and Chavez reinforces his fear of dying: "Can you hear? ... *If you are going to die*, tell me what happened . . . (sic)." J.A. 10; C.A. 23-24, emphasis added. Chavez continued: "OK, *yes you are dying*," Chavez then first suggests to Martinez that he grabbed the gun: "... did you get his gun? Did you grab the gun of the other policeman?" Martinez answers "Yes." J.A. 11; C.A. 24. Chavez pursues, "Did you want to kill the police or what? "Did you want to shoot the police? ... the gun was not pointed to the police. (Sic)." When Martinez answers "no" and pleads, "Doctor, please I want air, I am dying," at this moment, Chavez again asks if Martinez pointed the gun at the officer. This time Martinez changes his prior "no" answer to a "yes." J.A. 12; C.A. 25. C.A. 87: 25 to 88:1-22 and 89:1-10.[2] The District Court found that it could not imagine what Chavez or any officer could do to cause more pain. It found Chavez had knowledge of Martinez's state of pain, disability, his medicated condition, and his request for treatment. Chavez's coercive questioning after Martinez's repeated invocation of the privilege and Chavez's failure to give *Miranda*, are described, as a matter of law, to be a clear violation of constitutional rights. Pet. App. 21a.

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[2] The Court should take notice of the grammatically confusing questions throughout the transcription.

On nine (9) occasions Chavez reinforced Martinez's fear of dying by either asking or affirming that he was going to die.[3] The District Court found that Martinez was susceptible to coercion and that Chavez reinforcement of this fear of dying was psychologically coercive. Pet. App. 28a. It also found the totality of the circumstances revealed that Martinez did not want to talk and the questioning persisted. Pet. App. 22a.

Chavez admitted in his declaration that he is "well aware of the *Miranda* decision and of the importance of a citizen's right against self-incrimination." C.A. 451 ¶5. He also admits that he had education from the academy and training in college that a suspect's statement should be voluntary and he should stop questioning when a suspect says he doesn't want to talk. C.A. 111:14-25; 112:1-15.

The District Court found that Chavez's 45 minute interrogation was "excessively lengthy" in light of the fact that plaintiff was suffering excruciating pain and being prepared for emergency surgery and Chavez's interjection into the emergency room "exacerbates the coercive nature of the interview." Pet. App. 27a-28a.

Martinez had not committed a crime and was never charged with a crime for his alleged attempt to murder two police officers, nor with any crime at all. Contrary to Martinez's coerced statement, hospital records do not

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[3] "*Sir, if you are going to die .....* Huh? Sir, sir? And despite Martinez's repeated request for treatment, (J.A. 13-14; C.A. 26-27), and screams "Uuuggghhh! My belly hurts," Chavez persisted, "Sir, you are going to die . . . " ignoring Martinez's plea, "I want to be treated. Please." J.A. 13-22; C.A. 26-33.

reveal use of heroin or alcohol. The evidence is void of any forensic evidence of the gun having Martinez's fingerprints, nor of Martinez's blood on the gun. C.A. 377 ¶34. The record is void of any statement by Chavez that he was investigating "police misconduct" at any time.

The District Court found that at "the time Chavez was interviewing plaintiff, he had no knowledge of whether or not a prosecutor would charge plaintiff if he survived. Moreover, the Court has no statement from Chavez that he did not believe plaintiff would ever be charged." The Court found Chavez's argument "speculative hindsight," (Pet. App. 29a) and concluded that no reasonable officer would believe that an interrogation of an individual "receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain" was constitutionally permissible and denied qualified immunity. Id.

SUMMARY OF ARGUMENT

Petitioner's interrogation of Respondent violated values at the core of constitutional constraints on abusive government conduct. Respondent, an innocent passerby, was attacked without warning by one officer and then shot multiple times by another officer, resulting in instant blindness and paralysis. While helpless and in excruciating pain, Petitioner subjected him to an exceptionally coercive interrogation until he broke Respondent's will and obtained an incriminating statement. Respondent was never charged with a crime because there was no evidence he had committed a crime.

Respondent filed an action pursuant to 42 U.S.C. § 1983 contending that the shooting and the subsequent coercive interrogation violated his constitutional rights. After discovery, the District Court granted Respondent's motion for summary judgment against Petitioner based primarily upon Petitioner's statements, deposition testimony and the audiotape of the interrogation in the emergency room of the hospital. The District Court found that Petitioner had violated Respondent's clearly established rights under the Fifth and Fourteenth Amendments and he was not entitled to qualified immunity because any reasonable officer would have known that this conduct violated the Constitution.

Petitioner took an interlocutory appeal solely on the issue of qualified immunity. The Ninth Circuit affirmed the District Court's order denying Petitioner qualified immunity.

Petitioner asks this Court to adopt a radical interpretation of the Fifth and Fourteenth Amendments and our civil rights laws which would eviscerate long established constitutional protections against coercive interrogation. He asks that the self-incrimination and due process clauses be limited solely to exclusionary rules applicable only in a criminal trial.

ARGUMENT

STANDARD OF REVIEW: QUALIFIED IMMUNITY

The determination by the District Court of whether a police officer is entitled to qualified immunity is based on two questions: First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, (2001). If the answer to the first question is "no," then the case against the officer is dismissed because there is no constitutional violation. Id. If the answer is "yes," the second question is whether the officer could nevertheless have reasonably, but mistakenly believed that his or her conduct did not violate a clearly established constitutional right, because the officers acted reasonably under the circumstances. Therefore, the officers are entitled to qualified immunity. Id.

Here, Petitioner's brief, in large part, ignores the standard for review and urges facts that were specifically rejected by the District Court or that have no factual basis in the record. (See e.g., Pet Brief 35, "Chavez had every legitimate interest in investigating whether there had been police misconduct in the shooting of Martinez.") The record contains no evidence that Petitioner was conducting an investigation into police misconduct. In deposition he said the purpose of his investigation was to: "find out first off if the crime had been committed"; and "to find the truth" and "nothing else that I can think of." C.A. 98:5-25 and 99:1-7. Moreover, when asked in deposition if he had ever conducted an investigation of an officer involved shooting, he admitted he had not and that was the

province of detectives. C.A. 232: 21-25.

Petitioner's "Question Presented" asserts that Chavez's purpose was benign: "the officer's undisputed purpose was to obtain evidence from an individual, shot by the police, before that individual's anticipated imminent death." (See Pet. Brief.) This assertion was rejected by the District Court as "speculative hindsight." Pet. App. 29a. The District Court's determinations should not be overturned as this Court must assume the nonmoving party's version of the facts to be taken in the light most favorable to the party asserting the injury. *Saucier,* supra, 533 U.S. at 201. [4] The portion of the District Court's order (Pet. App. 19a - 23a) finding that Petitioner purposefully violated Respondent's rights were not questions upon which *certiorari* was granted by this Court and those facts should not be overturned. Nor was *certiorari* granted for review of the District Court's determination that Petitioner violated the Fourteenth Amendment. Petitioner raised only a Fifth Amendment issue in the Petition. The jurisdiction of an interlocutory appeal would be lost when, as here, the Petitioner seeks to have this Court review a denial of qualified immunity based on the defendant's allegations. Respondent requests the Court not adopt Petitioner's proffered argument.

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[4] The review of a District Court's denial of qualified immunity in a 42 U.S.C. § 1983 action is based upon a narrow exception to 28 U.S.C. § 1291. *Mitchell v. Forsyth,* 472 U.S. 511 (1985). (Interlocutory appeals are limited to issues of law based on the facts as alleged by the plaintiff or found to be undisputed by the trial court.) Id., 527.

QUALIFIED IMMUNITY FOR FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS BY OFFICER PETITIONER SHOULD BE DENIED

A. Petitioner's Conduct Violated Clearly Established Fifth Amendment Rights

Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts."[5] A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." *Elder v. Holloway,* 510 U.S. 510, 518 (1994)

The following sections demonstrate that the law violated by Petitioner was clearly established by: (1) the long history of this Court's relevant precedent, and (2) a series of appellate decisions holding that the Fifth Amendment privilege against self-incrimination applies in custodial settings, civil litigation, administrative and legislative proceedings, before grand juries, as well as in criminal courtroom.

Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (*en banc*) clearly established before the events in this case that conduct of the kind Petitioner engaged in violated the Fifth and Fourteenth Amendments. Indeed, Martinez's mental and physical incapacity at the time of his interrogation makes this an *a fortiori* case.

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[5] See *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985).

Moreover, *Cooper v. Dupnik* is grounded in the decisions of this Court going back for more than a century that clearly established the self-incrimination privilege and due process protections.

In *Boyd v. United States,* 116 U.S. 616 (1886) this Court stated that "any forcible and compulsory extortion of a man's own testimony . . . to be used as evidence to convict him of crime or to forfeit his goods . . ." is within the condemnation of the Fifth Amendment. Id. A year later in *Bram v. United States,* 168 U.S. 532 (1897) this Court held that the privilege against self-incrimination was a basic concept of liberty in a free society. "[A]ny compulsory discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government." Id., 631-632.[6]

The constitutional right against self-incrimination was crystalized in no uncertain terms in *Miranda v. Arizona,* 384 U.S. 436 (1966). In pronouncing what is now an essential aspect of established law and the culture of the United States, taught to Chavez and to every rookie police cadet and in every citizenship class and junior high school civics curriculum, this Court made clear the admonitions were embedded in the Fifth Amendment as constitutional rights. The Court forcefully held that the Constitutional prohibition against self-incrimination is "fully applicable during a period of custodial interrogation." Id., 460-461.

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[6] *Bram* held that under the self-incrimination clause the constitutional issue is "whether the confession was 'free and voluntary': that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." Id., 542-543.

Following *Miranda,* in 1978, this Court again illuminated the due process protections of the Constitution against coercive police interrogation in *Mincey v. Arizona,* 437 U.S. 385 (1978). The District Court described the circumstances under which Mincy's statement was coerced and analogized it to the present case. "He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation." (Id. at 398, footnote omitted). This Court concluded: "It is hard to imagine a situation less conducive to the exercise of a 'rational intellect and a free will.'" Id. In *Mincey* as here, the confession "was not product of a free and rational will." *Miller v. Fenton,* 474 U.S. 104, 110 (1985).[7]

The Ninth Circuit found that "[t]o the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey,* it is more egregious." Pet. App. 13a. Chavez's conduct falls within the aggravated conditions as discussed in the dissent in *Mincey*.[8] The incapacitated suspect's right to be free from coercive interrogation in a hospital setting was clearly established twenty years ago by this Court's relevant precedent in *Mincey.*

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[7] See Pet. App. 21a - 22a: "He had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details for the encounter with the police. The questioning persisted in spite of plaintiff's request for medical treatment and unequivocal statements that he did not want to talk."

[8] The dissent in *Mincey*, would consider conditions such as consciousness, whether medication was administered, a contradictory statement that there was coercion, etc., elements which appear in the case at bench.

The traditional constitutional protections of the privilege established in *Boyd* in 1897, reaffirmed in1966 in *Miranda,* and again in 1978 in *Mincey* were recently reaffirmed as constitutionally based limits on police interrogations in *Dickerson v. United States,* 530 U.S. 428 (2000). *Dickerson* confirmed the continued vitality of the constitutional rule that *Miranda* announced in setting limits on coercion in pretrial settings: . . . custodial police interrogation . . . exacts a heavy toll on individual liberty and trades on the weakness of individuals." Id., 434-435, footnote omitted.

These relevant precedents and those following show that the rights Chavez violated were clearly established.

1. Self-Incrimination and Due Process Rights Are Not Limited to When a Statement Is Introduced at a Criminal Trial

Chavez and the amici argue that the Fifth Amendment and the Fourteenth Amendments are only trial rights limited to the prophylactic remedy of exclusion in a criminal trial. Chavez's radical reinterpretation of the Fifth Amendment would permit officers to engage in the most egregious and abusive conduct in violations of decades of Fifth Amendment jurisprudence without remedy as long as the coerced statement is not introduced at a trial. There is no basis for such a rule other than to provide an unjustified immunity for patently unconstitutional conduct to police officers. This argument completely ignores fundamental aspect of the privilege against self-incrimination which extends the constitutional protections to a multitude of situations far

beyond the criminal "trial" exclusionary rule.

Chavez and the amici attempt to support their theory by relying: first, on a comment regarding the Fifth Amendment as a "trial right" based primarily on a comment in *United States v. Verdugo Urquidez*, 494 U.S. 259 (1990) and second, rewriting the text of the Fifth Amendment to read ". . . no person . . . shall be compelled in a criminal *trial* to be a witness against himself, unless and until the statement is introduced into evidence."

First, the comment regarding the Fifth Amendment in *Verdugo Urquidez* was dicta. [9] There, this Court held that the Fourth Amendment did not extend to a search in Mexico and provided no protection to the rights of an alien who is a citizen and resident of Mexico with no voluntary attachment to the United States. Id., 274-275. More important, the decision did not expressly overrule the numerous opinions of this Court and lower courts that expressly do not limit the protections of the Fifth Amendment to an exclusionary rule in a criminal trial. (See discussion of *Verdugo-Urquidez* in Opp. Cert., 14 - 17.)

Second, the text of the Fifth Amendment does not read as Chavez wishes and a contextual analysis of the privilege and the due process clause (see section A. 3.

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[9] "Dicta" is defined as: "(1) Opinions of a judge which do not embody the resolution or determinations of the court. (2) Expressions in a court's opinion which go beyond the facts before the court and are therefore individual views of the author of the opinion and not binding in subsequent cases." Black's Law Dictionary, West Pub., 5th Ed. p. 408.

below) in conjunction with this Court's decisions (see sections A. 2. and A. 4. and B below) demonstrate that these constitutional protections are not relegated solely to an exclusionary rule in a criminal trial.

Based on his faulty reasoning, Chavez concludes that Martinez, or any person in the United States, whether guilty or innocent (the evidence shows Martinez was innocent the evening of the shooting), whether accused of a crime or not, may be subject to all of the evils of intentional psychological unbearable coercion and deprivation of human dignity and not have a remedy for the intentional violation of that right itself. This is not the law, nor should it be. Nor is this the history of the privilege against self-incrimination and the protections of the due process clause as is demonstrated by the preceding and following cases of this Court. The America suggested by Chavez's theory is one in which most Americans would not want to live and one which most Americans would not tolerate. One in which local and federal police could, with impunity, hold persons and subject them to torture and, if a case is not prosecuted or if a coerced statement is not introduced into a criminal trial, there is no remedy for violation of an express constitutional provision in the Bill of Rights, protecting one of the core tenets of our Constitution.

One of the most obvious results would be that officers who deliberately ignore *Miranda* and resort to tactics that have been condemned by this Court, would be embolden to purposely disregard fundamental constitutional law. Not only would this dramatic change in the law nullify the efforts of this Court to establish "concrete constitutional guidelines for law enforcement agencies and courts to follow," (*Miranda,* 435), it would

create, for most Americans, distrust for law enforcement. This result – the practice of intentionally questioning an in-custody criminal suspect in violation of *Miranda* and the Fifth and Fourteenth Amendments – is a very real threat to civil liberties amply documented by Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich L.R., 1121 (2001). Weisselberg's article documents that law enforcement agencies in California are training officers to consider violating *Miranda.*[10]

2. Seminal Cases Have Rejected Chavez's Contention

In *Spano v. New York*, 360 U.S. 315 (1959) the Court demonstrated that the dictates of the due process clause control the legality of the actions by police during interrogations, and its reach is not limited to criminal trials:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which

[10] Documenting police training throughout California condoning intentional violation of *Miranda*. See also Charles D. Weisselberg, *Saving Miranda,* 84 Cornell L. Rev. 109 (1998).

> they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. Id., 320-321.

In *Haynes v. State of Washington*, 373 U.S. 503 (1963) the Court explicitly declared that the methods of the police that were employed to coerce a written confession were themselves "constitutionally impermissible" Id., 519.

In *Malloy v. Hogan*, 378 U.S. 1 (1964),[11] Malloy never gave a statement and therefore none was ever introduced into a criminal trial. There, this court rejected Chavez's principle argument here. Stating that the decisions of the Court, particularly those involving coerced confessions had become "a fundamental part of the fabric of our society," (Id., 9-10) and that an accused is privileged against incriminating himself " . . . either in the jail house, the grand jury room, or on the witness stand in a public trial. . . ." Id., footnote 8.

In 1966 the *Miranda* Court addressed "The question in these cases is whether th. ivilege is fully applicable during a period of custodial interrogation." *Miranda,* 460-461. The Court made absolutely clear that it was:

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal*

[11] Malloy was ordered to testify in an inquiry into alleged gambling activities. His asserted the privilege was held in contempt and imprisoned. This Court held the privilege against self-incrimination was applicable to the state court.

court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. Id. at 467, emphasis added.

A year after *Miranda,* in *Spevack v. Klein*, 385 U.S. 511 (1967), an attorney was disbarred for failing to waive his privilege against self-incrimination at a judicial inquiry into professional misconduct. Although there was no statement that was used in a criminal trial, the Court ordered reinstatement for the constitutional violation. Following *Spevack*, a year later in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968), public workers called before the grand jury were fired for refusing to testify against themselves or waive immunity. This Court found their Fifth Amendment rights had been violated and ordered reinstatement for the fired employees. The workers never made any statement, nor was there a criminal trial. In *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) the Court held unconstitutional a state statute which would have compelled architects to testify over an assertion of Fifth Amendment rights, by denying them government contracts unless they waived any claim of immunity from prosecution based upon their answers. Again, no incriminating statement was introduced into a criminal trial. In the context of an administratively compelled statement involving police officers, the violation of the Fifth Amendment occurs if the officer is forced to give a statement at the threat of losing his/her job when the same statement can also be used for criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493 (1967), and *Gardner v. Broderick*, 392 U.S. 273 (1968). In *Michigan v. Tucker,* 417 U.S. 433 (1974) this

Court, in an opinion written by Chief Justice Rehnquist again specifically rejected the narrow formulation urged by Chavez:

> Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock, supra;* to civil proceedings, *McCarthy v. Arndstein, 266 U.S. 34 (1924);* to congressional investigations, *Watkins v. United States, 354 U.S. 178 (1957);* to juvenile proceedings, *In re Gault, 387 U.S. 1 (1967);* and to other statutory inquiries, *Malloy v. Hogan, 378 U.S. 1 (1964).* (Id., 440, emphasis added.)

Just two years ago this Court directly rejected the narrow interpretation of the Fifth Amendment's self-incrimination privilege in *United States v. Hubbell,* 530 U.S. 27 (2000). [12] In discussion the government's contention that the evidence was not introduced into evidence, the Court stated:

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[12] There Court upheld the dismissal of the government's prosecution of Hubbell after he produced documents in response to a court order issued pursuant to 18 U.S.C. § 6003 (a). The order granted him immunity and the Court held that Hubbell could not be compelled to produce the documents without first receiving a grant of immunity under the statute because such immunity was co-extensive with the constitutional privilege.

Finally, the phrase "in any criminal case" in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Id., 37-38, citing *Hoffman v. United States*, 341 U.S. 479, 486, (1951).

3. The Text of the Fifth Amendment Is Incompatible with Petitioner's Narrow View

Petitioner's argument that a due process violation can occur only at "trial" is sophism. Justice Souter pointed out in *United States v. Balsys* 524 U.S. 666, 673 (1998), that "the cardinal rule [is] to construe provisions in context."

The Fifth Amendment has four distinct clauses (separated by a semi-colon), with the third clause reading, "*nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .*" Grammatically the clause "without due process of law" is the main clause (separated by a comma) to both antecedent subordinate clauses united by the conjunction "nor" and thus are of equal structural rank. The subordinate elements are grammatically dependent on the sentence base "*without due process of law,*" establishing its (the base or principal idea) connection to the subordinate clauses "nor shall be compelled . . . against himself" and "nor be deprived of life, liberty

. . ." and draw attention to the principal idea "*without due process of law.*" [13] Thus, the Fifth Amendment contains its very own mandate that "without due process of law" "no person in a criminal case shall be a witness against himself *nor deprived of life, liberty*, or property." (Emphasis added.)

The Framers did not use the word "criminal *trial*" (limiting the scope only to "trial procedures") but instead selected the broader concept of "criminal *case.*" The word "case" has been defined by this Court to encompass the entire criminal process, including police interrogations (as subsequently held in *Miranda*).

The word "case," which the Oxford Dictionary indicates dates back to 1523, is defined in part as "a case as presented or put to the Court by one of the parties in a suit; hence, the sum of the grounds on which he rests his claim." Black's Law Dictionary, 5th Edition, defines the word "case" as "A general term for an action, cause, suit or controversy, at law . . . a question contested before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice . . . a Criminal act requiring investigation by police. . . . In ordinary usage, the word "case" means "event," "happening," "situation," "circumstance."

By contrast, "trial" is defined by the Oxford Dictionary (and dated back to 1577) as "the examination and determination of a cause by a judicial tribunal."

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[13] *Hodges' Harbrace College Handbook*, Twelve Edition, Horner, Webb, Miller. 1994, pg.241.

Black's Law Dictionary, 5th Edition, defines it as "a judicial examination and determination of issues between parties to action . . . whether they be issues of law or fact. A judicial examination, in accordance with law . . ."

Webster's New World Dictionary, 3rd Ed., defines "trial' as "the act or process of trying, testing, or putting to the proof . . . ." "Judicial" of course meaning "belonging to the office of a judge" - the trial.

It would be illogical that our Framers concerned with torture chambers, would have intended the Fifth Amendment to apply only to "trials" and not to the entire criminal "case" or process. It follows, and this Court has already held, that the police criminal interrogation process falls within the application of the "due process clause." In *Colorado v. Connelly*, this Court held that the "coercive police activity" is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause. Id., 167,

Another clear interpretation that the "criminal process" is not just a "trial" is found in *Duckworth v. Eagan* 492 U.S. 195 (1989). This Court clarified that "a violation of the constitutional right occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process." Id., 209, citing *Colorado v. Connelly*. Had the Court intended this "right" to be violated only at "trial," and if so, no violation occurs, it would not have used the words "criminal process" nor would the Court have held that "police activity is a necessary predicate" to a violation of

due process by coercive interrogation in the above holdings. Thus, the word "case" within the context of the Fifth Amendment, by its plain meaning and by this Court's precedent, includes the "criminal process" and encompasses the predicate action or "interrogation by police" as part of the "criminal case."

Consistent with this contextual analysis is *United States v. Hubbell,* discussed above, which explained that the phrase "in any criminal case" encompasses pre-trial compelled statements that lead to incriminating evidence.

4. Lower Courts Have Rejected Petitioner's Contention

The thrust of Chavez's argument is to repeatedly attack the Ninth Circuit and the holding of *Cooper v. Dupnik,* [14] as being the sole authority that has held that a purposeful violation of the self-incrimination privilege and due process is actionable regardless of whether the statement is admitted into a criminal trial. [15] In fact, numerous courts of appeal have held that the Fifth Amendment is violated at the time of the coercion and

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[14] Upholding § 1983 claim and denying qualified immunity for violation of Fifth Amendment rights where police had purposely coerced incriminating statements while in custody, although no use at trial. "The Task Force's wrongdoing was complete at the moment it forced Cooper to speak." Id., 1242-1244

[15] See also *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.1999) *en banc* court found that intentional questioning after invocation of the privilege constitutes a violation although statements not introduced into criminal trial.

that the coerced statement need not be introduced at the individual's criminal trial before the Amendment is violated.

For example over 12 years ago the D.C. Circuit stated that Iran-Contra co-conspirator Oliver North's Fifth Amendment rights were violated at the time the statement was taken. *United States v. North,* 920 F.2d 940 (D.C. Cir. 1990). The court held that introducing evidence based on immunized testimony to the grand jury would itself violate constitutional rights and distinguished cases in which a statement is taken in violation of a person's constitutional rights and later introduced in evidence.

A year later in *Gray v. Spillman,* 925 F.2d 90 (4th Cir. 1991) the Fourth Circuit upheld a § 1983 claim for violation of the Fifth and Fourteenth Amendments based upon officers' use of threats, intimidation and force in an attempt to coerce an incriminating statement that the suspect finally made, but that was never introduced into a criminal trial. (*Id.*, 91.) The Second Circuit in *Weaver v. Brenner,* 40 F.3d 527 (2nd Cir. 1994), rejected the use-at-trial contention where the statement that was purposely taken in violation of *Miranda* and coerced but was not introduced in a criminal trial. [16] Similarly, the Tenth Circuit in *Clanton v. Cooper,* 129 F.3d 1147 (10th Cir. 1997) upheld a § 1983 claim and denied qualified immunity for the defendant who coerced a witness in violation of his Fifth Amendment rights (Id., 1158)

[16] "... it is well-settled that for these purposes the criminal case begins with custodial interrogation." (Id., 435, citing *Miranda, Michigan v. Tucker,* and *Lefkowitz v. Turley,* quotes omitted).

although the statement was never introduced into her criminal case. The Eighth Circuit recently in *Wilson v. Lawrence County,* 260 F.3d 946 (8th Cir. 2001) denied qualified immunity where violations of plaintiff's Fifth and Fourteenth Amendment rights were based upon defendants' use of psychologically overbearing interrogation to coerced a murder confession from a mentally retarded man. Id., 952.[17]

This Court's holdings have developed the broad range of circumstances where the Fifth Amendment privilege protects against compulsory self-incrimination. It extends to any governmental proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. As in *Miranda*, this Court has consistently recognized that to fulfill its purposes the constitutional privilege against self-incrimination has two primarily interrelated facets: (1) the government may not use compulsion to elicit self-incriminating statements; and, (2) the Government may not permit the use of self-incriminating statements elicited by compulsion. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 57 fn. 6 (1964).

5. The "Coercion" Contemplated by *Kastigar* Immunity Does Not Support Petitioner's Contention

Petitioner argues that the holding in *Kastigar v.*

[17] The confession was never introduced into evidence as the plaintiff entered a plea before the trial to avoid the death penalty. An independent investigation resulted in a pardon and plaintiff was released after nine years in prison. (Id.)

United States, 406 U.S. 441 (1972) where a witness was compelled to testify before a grand jury under a grant of use immunity should be interpreted as meaning that police "coercion without the use of the statements in a criminal trial does not violate the Fifth Amendment." (See Pet. Bf., 16.) However, Petitioner makes the leap in logic in equating the "coercion" exerted by a grant of immunity over an assertion of the self-incrimination privilege compelling a witness to testify, with the physical and psychological "coercion" that occurs when a suspect is subjected to impermissible interrogation techniques or overbearing of a suspect's will. The similarity in these situations is only in the word "coercion," but the differences are worlds apart.

The fallacy of Chavez's logic is exposed by this hypothetical. A government prosecutor serves a subpoena on a suspect-witness to appear before a grand jury to testify about their knowledge of who committed a crime when a demonstrator, standing behind a group, threw a ripe tomato at a congressman's car while he was visiting Los Angeles. The suspect-witness speaks with a lawyer and asserts his Fifth Amendment privilege. In response, the government applies to the district court for an order directing the witness to answer questions under a grant of immunity. The witness can obtain an attorney, go into district court and oppose the issuance of the order and argue the terms of the immunity. If the court orders the witness to appear and answer questions under the grant of immunity, the witness can still exercise a free will to obey or refuse to appear and face arrest and be held in contempt. The witness still may retain her human dignity and personal integrity and sit in jail. Yes, the choice of immunity and testifying or being held in contempt is coercion, but the process by

which it occurs is one which observes and balances the valid interests of the government against the rights of the suspect. A court of law ensures that the "coercion" is consistent with due process, measured and just, while our laws and human dignity are respected.

However, that type of "coercion" cannot be compared to the "coercion" that occurs if the prosecutor sends out a police squad and they arrest the witness and as Chavez argues: "use brute force and torture to extract an involuntary confession from a suspect." (See (Pet. Brief, 16, fn. 4, arguing that this conduct is not a constitutional violation.) Notwithstanding the difference, the Petitioner concludes that "the officer would not have violated the [Fifth Amendment] privilege because the suspect would not yet have testified against himself at trial." (Pet. Brief, 16, fn. 4.) The Fifth Amendment has traditionally condemned this type of "coercion" and the Petitioner's argument is illogical, unsound and should not be the law.

B. The Facts Show that Chavez Also Violated Martinez's Due Process Rights to Be Free from Arbitrary Police Conduct

1. Chavez Violated Due Process at the Time He Coerced an Incriminating Statement

The Court's opinion in *Colorado v. Connelly,* 479 U.S. 157 (1986) made it absolutely clear that the purpose of the due process clause in reviewing confessions was to prevent abuses by police in pre-trial custodial interrogations. The Court began its opinion pointing out that the due process clause was aimed at "*certain interrogation techniques* . . . are so offensive to a civilized

system of justice that they must be condemned." (Id., 163, emphasis added.) Preventing "*coercive government misconduct* was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*," where police officers extracted confessions through torture. Id. Citing numerous confession cases, the Court emphasized that since *Brown* v. *Mississippi,* due process cases have focused upon "the *crucial element of police overreaching*" . . . all have contained a substantial element of *coercive police conduct*. (Id., 163-164, emphasis added, footnote omitted.)

Connelly left no doubt that the purpose of due process was to protect against police overreaching in the interrogation setting and not simply an exclusionary rule limited to prohibiting admission at trial by concluding that:

> Moreover, suppressing respondent's statements would serve *absolutely no purpose in enforcing constitutional guarantees.* The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. See *United States v. Leon*, 468 U.S. 897, 906-913 (1984). (Id., 167, emphasis added.)

It is instructive to note that the cite to *United States v. Leon* was a reference to the Fourth Amendment and the holding that the constitutional violation occurs at the time of the search or seizure and that the exclusion of evidence at trial is a remedy. Because the intent of the holding was to "deter future violations of the constitution" and the violations that were the primary focus of the opinion were interrogation techniques

which occur in custodial interrogations and to prevent crucial elements of police overreaching. The inescapable conclusion is that the constitutional violation occurs at the time of the coercion and without regard to whether a prosecution is commenced or the statement is introduced.

To limit the due process clause to a trial right would defeat the principal of deterring "future violations of the constitution." So, if an innocent person such as the plaintiff in *Cooper v Dupnik* is intentionally harassed, badgered and subject to psychologically coercive interrogation and his *Miranda* rights are intentionally violated but he gives no statement, Chavez's argument logically means there is no remedy, no matter how egregious the police conduct. Limiting due process to a trial right would not "deter future violations of the constitution" and would undermine the basic protections Americans expect to have.

The passages quoted above in *Connelly* were cited with approval in *Duckworth v. Eagan,* 492 U.S. 195 (1989), where the Court reaffirmed it's holding that the coercion of a statement during interrogation, in contrast to a technical mistake in giving *Miranda* warnings prior to obtaining a voluntary inculpatory confession, violated the constitutional guarantees of the due process protected by the Fifth and Fourteenth Amendments. Justice O'Connor in a concurring opinion stated:

> The [Fifth] Amendment has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and

may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. See *Colorado v. Connelly*, 479 U.S. 157, 163-164, and n. 1 (1986). *Id.*, 209.)

Justice O'Connor's citation of *Connelly* referenced the precise conduct that the due process clause aimed to protect: "certain interrogation techniques," preventing "coercive government misconduct;" "where police officers extracted confessions through torture;" "crucial element of police overreaching;" and the substantial element of "coercive police conduct." *Connelly, supra*, 479 U.S. at 163-164, fn.1 omitted. Justice O'Connor's description of the "criminal process," as opposed to limiting the constitutional violation to criminal "trial," leaves no doubt that this Court continues to maintain the traditional broad reach of the due process protections against coercive interrogations and that these constitutional violations occur when the coercion happens. [18]

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[18] See e.g., *Williams v. United States*, 342 U.S. 97 (1951) upholding conviction of a "special police officer" for a willful violation of due process rights by beating confessions from persons suspected of lumber theft. Id., 98. Because the suspects had not been prosecuted for the thefts, the confessions had never been admitted into evidence. See also the Courts of Appeal decisions upheld due process violations where the statements were never introduced into evidence *Weaver v. Brenner*, 40 F.3d 527 (2nd Cir. 1994); *Gray v. Spillman*, 925 F.2d 90 (4th Cir. 1991); *Ware v. Reed*, 709 F.2d 345 (5th Cir. 1983); *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989); *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001); *Cooper v. Dupnik*, 963 F.2d 1220

2. It is Clearly Established that Due Process Protects Against an Intentional Violation or Deliberate Indifference to the Right to Be Free from Coercive Interrogations

Since the time of this Court's early explanations of due process, it has stated that the core of the concept is to be protected against the arbitrary exercise of the powers of government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998), cites omitted.) The Court's opinions dealing with abusive executive action have repeatedly emphasized that the Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression.'" Id., 846, cites omitted. "'Substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . *or* interferes with rights 'implicit in the concept of ordered liberty.'" Id., 847, cites omitted, emphasis added. (See also *Miller v. Fenton*, supra, 109, and *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

3. Chavez's Indifference to Martinez's Condition Combined with His Intentional Violations of Clearly Established Constitutional Rights Violates Due Process

The undisputed evidence is that when Chavez arrived at the scene he knew that Martinez had been shot in the head, was paralyzed and screaming in pain and that he was under arrest, handcuffed in police

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(1992); *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.1999) *en banc*.

custody. Chavez knew Martinez was the sole suspect accused of attempted murder on a police officer and that he (Chavez) was conducting a criminal investigation of that crime at the time he went into the ambulance.

From the time he entered the ambulance until he arrived at the hospital, Chavez had considerable time to fully appreciate and evaluate Martinez's incapacity to give a voluntary statement due to his extreme state of trauma, shock and disability as Martinez drifted in and out of consciousness. Notwithstanding this knowledge and although having adequate time to deliberate and to consult his superiors, Chavez deliberately ignored Martinez's extreme state of trauma, shock and disability and intentionally interrogated without giving any *Miranda* warnings, intentionally continued interrogating without attempting to obtain a knowing and intelligent waiver of *Miranda*. He deliberately ignored Martinez's assertion of his right to remain silent, repeatedly returned after being told by the medical staff to leave the emergency room as Martinez was being readied for surgery, and he intentionally used coercive interrogative techniques to overbear Martinez's will and coerced an involuntary statement.

Negligent conduct that inflicts harm will not violate substantive due process rights. *Davidson v. Cannon*, 474 U.S. 344, 348, (1986). However, *Lewis* made clear that:

> . . . behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise

> to the conscience-shocking level. 'Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.' Id., 849 emphasis in original).

The point of conscience-shocking can also be reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence.'" *Lewis*, 850. Deliberately indifferent conduct was held to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial. Id., cites omitted. This Court held that due process claims are evaluated by an appraisal of the totality of facts in a given case. *Id.*

In *Lewis*, the Court analyzed the markedly different circumstances of pretrial custody contrasted with high-speed law enforcement chases to demonstrate why the deliberate indifference that "shocks" where a person is in custody may not shock the conscious in a high speed chase.

The deliberate indifference fault standard is sensibly employed when actual deliberation is practical as in the custodial situation where forethought about an inmate's welfare *"is not only feasible but obligatory"* under situations where the prisoner is incapacitated so that he or she cannot exercise ordinary responsibility for his own welfare. Id, 851. "The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and

make reasonable provision for the patient's welfare." *Lewis,* 852 fn. 12. The Court found that deliberate indifference where "such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Id., 853.

Here, Chavez had the luxury of having time to make an unhurried judgment, the chance for repeated reflection, and no *valid* competing obligations. From the time he saw Martinez laying in the grassy field with his hands handcuffed behind his back and screaming in pain, saw the seriousness of his wounds and his state of disability, he had ample time to do what his most basic training and constitutional obligations require, to wait until Martinez could give a free and voluntary statement after being advised of his constitutional rights protected by Miranda.

He had time to deliberate in the ambulance when he saw pain medication being administered. He had time to deliberate before he entered the emergency room, and during the 45 minute interrogation as Martinez lay screaming in pain, blinded and paralyzed, floating in and out of consciousness as more pain medication was being administered to prepare him for surgery. Instead, he acted with deliberate indifference to Martinez's condition and intentionally used coercive tactics to extract a confession.

There is no evidence in the record for Chavez's argument that his purpose was to obtain evidence of the shooting officer's misconduct. This was expressly repudiated by the District Court as a "sham declaration" which contradicted his earlier deposition testimony and

tape-recorded statements.[19] It is patently obvious that Chavez knew of Martinez's vulnerability and fear and he used it to overbear his will. There would have been no prosecution if Martinez had he died. The intentional act to interrogate at that time and while Martinez was even unable to remember his birthday (See Jt. App. 7) was a purposeful violation of due process with the intention to "worsen his legal plight."

Lewis made clear that where there is time to deliberate and the intent of the officer is to "harm suspects physically or *to worsen their legal plight,* then liability under the Fourteenth Amendment, is redressible by an action under § 1983." Id., 854, emphasis added. *Lewis* dramatically illustrates the distinction between the split second decisions that must be made in a high speed chase, necessitated by the speeding vehicle's failure to stop and the officer's duty to attempt to stop the motorcycle, from the situation in which Chavez found himself. Chavez was required to, and had plenty of time to use "forethought about an [arrestee's] welfare [because] it is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." Id., 851.

4. There Are Solid Policy Reasons Why the Narrow Reading of the Fifth and Fourteenth Amendments Should Be Rejected

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[19] A party cannot create an issue of fact by a declaration contradicting his own deposition or other sworn testimony. These "sham declarations" contradicting earlier harmful testimony creates no genuine issue of fact on a summary judgment motion. *Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 1597, 1603-1604 (1999) (reviewing "sham affidavit" holdings in every circuit.)

Michigan v. Tucker, 471 U.S. 433 (1974) also explained that the broad scope the Fifth Amendment privilege is necessary to protect the "evils" that will certainly flow from Chavez's argument: the government policy "that there is no Fifth of Fourteenth right to be free from coercive questioning" advanced by Chavez and the amici briefs:

> The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury. Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding. (Id., 440-441, emphasis added.)

Precisely because exclusionary rules are limited to a trial, they alone cannot protect the invocation of these rights in all their applications cited above. Over 90% of criminal felony and misdemeanor cases are not tried and are resolved by plea bargain. Of those that do go to trial, the exclusionary is rule invoked only in a minuscule number of cases. [20] Therefore, exclusion at trial of

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[20] See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, n. 6 (2002), analyzing data compiled from the Bureau of Justice Statistics, U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 1998, at 432.

knowingly coerced statements cannot effectively protect the privilege and there will be no effective deterrent for purposeful coercive interrogations violating due process in all the other situations *Tucker* describes in which the self-incrimination privilege and due process is applicable.

42 U.S.C. § 1983 liability fills the gap and deters police misconduct. Within this forum, qualified immunity protects officers from reasonable mistakes, but not unreasonable conduct like that of Chavez who purposefully ignored Martinez's condition, chose not to give required *Miranda* warnings, used coercive tactics and ignored Respondent's invocations of his right to remain silent. Denial of qualified immunity for his unreasonable conduct will deter knowing violations of constitutional rights.

Presently, most officers respect their obligations and properly give warnings and 80% of suspects waive their *Miranda* rights.[21] However, unless there is the deterrence of § 1983 civil liability, an officer who deliberately ignores an invocation of *Miranda* rights or convinces a suspect, even by coercion, to waive *Miranda* has an incentive to obtain a "useful" but unconstitutional statement.[22] Thus, by affirming the district and appellate court's decisions this court will simply reaffirm

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[21] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996)

[22] An unconstitutional "useful" statement may be excluded from the prosecutor's case-in-chief, but it can be used to keep the defendant from testifying or subject him to cross examination or lead to "fruits" such as other witnesses or physical evidence of the crime.

that the constitutional guidelines affirmed in *Dickerson* and the rights of self-incrimination and due process are not to be deliberately ignored.

Dickerson made clear that the policy considerations extending constitutional self-incrimination rights of a person suspected of a crime are to set "concrete" constitutional limits in-custody interrogation, "and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.*, 439-440, cites omitted, emphasis in the original.[23] If the Fifth Amendment's privilege and due process is limited to an exclusionary rule at a criminal trial, then these policy considerations are defeated. Martinez urges this Court to reject this view.

5. Chavez's Misconduct Is a Violation of the Liberties That the Fifth and Fourteenth Amendments Are Intended to Prevent

Chavez's purposeful transgressions in the present case are precisely the type of conduct that was of concern to the Justices in *Miranda* and in *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Miranda* made clear that although it was concerned about the use of physical brutality in the pursuit of confessions, it focused primarily on psychological coercion. [24]

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[23] See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules: Safe Harbors and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030 (2001) discussing the necessity of "bright-line rules for law enforcement officials to follow." .

[24] "Since . . . [1940] this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Id., 448, quoting *Blackburn v. Alabama*, 361 U.S. 199 (1960)]

Martinez's statement was the product of aggressive purposeful psychologically coercive interrogation designed to take full advantage and oppress a helpless, blinded, paralyzed, heavily medicated person who simply wanted to be left alone and be treated. The cold words on the transcript of the interrogation do not fully convey the totality of the circumstances, Martinez's disability and pain. The actual tape recording is the best evidence of the circumstances Chavez witnessed.

The statements extracted by Chavez are not technically involuntary, or presumptively involuntary, as in *Oregon v. Elstad*, 470 U.S. 298 (1985), where the first statement made by the defendant was not involuntary or the result of deliberately improper tactics. Id., 305-307.[25] In contradistinction to Chavez, the police in *Elstad* did not use deliberately improper tactics during the interrogation that produced the first incriminating statement or the second. (Id., 316, 318.) Thus, there was no evidence of coercion or oppression in each of the cases in which this Court has allowed technical violations of *Miranda* such as in *Elstad* or *Quarles v. New York*, 467 U.S. 649 (1984). In *Quarles* the officer asked a suspect "where's the gun" in a crowded supermarket at

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[25] Although the police committed a *Miranda* violation by interrogating Elstad without first advising him of his rights, there was no evidence that they were aware that they should have administered a *Miranda* warning, because it was not clear the brief conversation in Elstad's living room was custodial, there was no restraint and the defendant's mother waited in the kitchen. Id., 305-307, 315.

the time of the detention. The suspect nodded his head. Nor was there coercion in *Harris v. New York,* 401 U.S. 222 (1971) where the defendant charged with selling heroin gave a voluntary statement after a faulty *Miranda* violation or *Oregon v. Hass,* 420 U.S. 714 (1975) where the defendant accused of stealing two bicycles was given *Miranda* admonitions and voluntarily confessed, but invoked his right to counsel and gave subsequent voluntary statement pointing out where he had hidden the bicycles.

Here, Martinez's statement was involuntary because it was actively compelled and coerced by law-enforcement officers during a custodial questioning of a criminal suspect, as those terms are used in *Spano v. New York, Haynes v. Washington, Mincey v. Arizona,* and *Miranda.*

Here, the decisions of the District Court and of the Ninth Circuit are consistent with the Fifth Amendment protections described in *Miranda, Dickerson, Michigan v. Tucker,* and the other cases in which the self-incrimination and due process rights were violated as discussed above.

Respondent does not suggest this case should establish a claim for relief where police officers have a conversation with a suspect in a benign way, without coercion or tactics that compel him to speak. [26]

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[26] See Susan R. Klein, Miranda *Deconstitutionalized When the Self Incrimination Clause and Civil Rights Act Collide,* 143 U. Penn. L. Rev. 417, 434-48 (1994), collecting and discussing cases holding an inadvertent *Miranda* violation is not actionable under § 1983.

Affirming the District Court's decision will continue to uphold and strengthen the traditional broad reach of the Fifth and Fourteenth Amendments described in *Michigan v. Tucker,* because it conforms to the expectations of the people of the United States. Americans, especially an innocent person falsely accused of a crime, rightly expect that if a police officer fails to "give them their rights" and refuses to stop interrogating after being asked to stop, coerces them and overbears their will until they say something – anything –to end their nightmare, that the liberty interests inherent in the Fifth Amendment will protect their human dignity and personal integrity not to be forced to speak against their will, whether or not they are charged with a crime.

The *Tucker* vision of the Fifth Amendment is consistent with the purposes of § 1983 litigation. "[S]ociety has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault. *Smith v. Wade,* 461 U.S. 30, 55 (1983). Chavez's conduct is a classic example of purposeful police misconduct that is "identical with the historical practices at which the right against self-incrimination was aimed." (*Michigan v. Tucker,* 444.)

C. Chavez Could Not Have Reasonably Believed That His Conduct Did Not Violate a Clearly Established Constitutional Right Because He Acted Unreasonably under the Circumstances

1. Chavez's Mistake of What the Law Required in the Situation He Faced Was Unreasonable

The relevant inquiry in determining the second question relevant to granting or denying qualified immunity is whether Chavez acted reasonable given the circumstances he confronted, assuming the facts to be taken in the light most favorably to Martinez. The concern of the immunity inquiry stated in *Saucier* "is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." Id., 205.

Saucier acknowledged that it is sometimes difficult for an officer to determine how the relevant legal doctrine [in that case an alleged split second decision to use a "gratuitously violent shove" allegedly received when he was placed into a van (Id., 208)] will apply to the factual situation the officer confronts. In concluding that there was no clearly established law preventing force in that situation, this Court's analysis noted that officer's right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. A reasonable officer in Saucier's position could have believed that a split second decision to hurrying the arrestee away from the scene (where the Vice President was speaking) due to the possible threat, was within the bounds of appropriate police response given the large crowd, the necessity to protect the Vice President and restoring order to the scene. Id., 208-209.

In contrast, coercion has no place in the law of voluntariness. Chavez had no reasonable belief that his overbearing coercive interrogation and intentional violation of *Miranda* admonitions were "within the bounds of appropriate police responses." In comparison to Saucier's situation where a reasonable officer in Saucier's position could have believed that hurrying Katz

away from the scene, and pushing him into a van was within the bounds of appropriate police responses, Chavez's deliberate indifference to Martinez's shockingly obvious state of physical and mental disability; his deliberate choice not to give *Miranda* warnings or obtain a knowing waiver of the admonition; his deliberate refusal to stop interrogation after invocation of the privilege is patently unreasonable. This Court should affirm the conclusion that he acted unreasonably.

2. Under The Law No Reasonable Officer Could Have Believed the Interrogation Was Lawful.

The District court properly found that no reasonable officer would believe that an interview of an individual "receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain constitutionally permissible." Pet.App. 29a. The facts presented prove Chavez knew Plaintiff was arrested, knew he was a suspect of attempting to shoot a police officer, and knew *Miranda* warnings were required and that a statement had to be voluntary. No reasonable officer could believe coercive tactics to extract incriminating false statements was lawful. No reasonable officer could believe that coercing a false involuntary "dying declaration" was lawful.

Michael Palmieri, Senior Officer, Oxnard Police Department and the chief investigator in the shooting of Martinez testified that the reasonable police officer at Oxnard would comply with the Fifth Amendment in the

situation confronting Chavez. [27]

D. Section 1983 Claims for Constitutional Violations of the Fifth and Fourteenth Amendments are Actionable

Chavez argues that the Fifth and Fourteenth Amendments should be excluded from those rights actionable under § 1983 because violations do not occur except, and only when, a statement taken in violation of the these amendments is introduced into evidence in a criminal "trial." That contention is contrary to the express language of the 42 U.S.C. §1983, which does not carve out an exception for any Amendment.

The Statute encompasses the entire "Constitution" – not selective portions thereof. 42 U.S.C. § 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster,* 407 U.S. 225, 239 (1972). The high purposes of this unique remedy make it appropriate to accord the statute "a sweep as broad as its language" because the § 1983 remedy is one that can "override certain kinds of state laws." *Monroe v. Pape,* 365 U.S. 167, 173 (1961). Since *Monroe* this Court has repeatedly enforced an expansive construction of § 1983, emphasizing the intention of the Congress of 1871 to create a broad federal remedy for violations of

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[27] C.A. 420, unopposed excerpt of the Deposition of Michael Palmieri, pp. 19:15 through 20:6, emphasis added.)

constitutional rights. [28] *Monroe* precisely focused on why § 1983 provided a remedy for a coerced confession in explaining the statute's higher purpose, the vindication and deterrence of constitutional violations:

> There will be many cases in which the relief provided by the state . . . will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Id., 198, Footnote 5.

Civil rights cases, as evidenced by the action at bench, seek to utilize the scope of § 1983 to prevent future violations by effectuating accountability for government actors, who would otherwise be excluded from the "check and balance" of justice. Respondent urges this Court to not adopt a theory that would be contrary to the purpose for which §1983 was enacted.

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[28] See e.g., *Wilson v. Garcia,* 471 U.S. 261 (1985), ("The rights enforceable under § 1983 include those guaranteed by the Federal Government in the Fourteenth Amendment: that every person within the United States is entitled to equal protection of the laws and to those 'fundamental principles of liberty and justice' that are contained in the Bill of Rights and 'lie at the base of all our civil and political institutions.'" Id., 278-279, footnotes omitted.)

CONCLUSION

The uncontroverted facts established, as a matter of law, that Chavez's interrogation violated Martinez's Fifth and Fourteenth Amendment rights and the involuntary and untrustworthy statements were knowingly and deliberately coerced from an incapacitated helpless person. As a matter of law Chavez did this to "to worsen [Martinez's] legal plight."

Martinez has shown that under *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Saucier v. Katz*, the District Court and the Ninth Circuit properly denied qualified immunity. Here, "The contours of the right are sufficiently clear that a reasonable official in Chavez's circumstance would understand that what he is doing violates that right." Martinez has shown that (1) The law governing the official's conduct was clearly established; (2) Under that law, no reasonable officer would have believed the conduct was lawful. The Ninth Circuit's and the District Court's denial of Chavez' motion for summary judgement and for qualified immunity should be affirmed.

Respectfully submitted,

R. Samuel Paz
Counsel of Record
Law Offices of R. Samuel Paz
Biltmore Court - 7th Floor
520 S. Grand Avenue,
Los Angeles, CA 90071
(310) 410-2981

Sonia M. Mercado
Sonia Mercado & Associates
Biltmore Court - 7th Floor
520 S. Grand Avenue,
Los Angeles, CA 90071
(213) 683-5313

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No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioner

22pp

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REPLY BRIEF FOR PETITIONER

Ben Chavez encountered Oliverio Martinez under truly exigent circumstances. In the aftermath of a tragic struggle with two patrol officers, with Martinez apparently clinging to life, petitioner sought – as respondent now concedes (Br. 10) – "to find the truth" and to determine "if [a] crime had been committed." C.A. App. 98-99; J.A. 20-22. Chavez did not have the luxury of time: Respondent told him no fewer than eight times that "he believed he was dying" (Pet. App. 21a); if the officer was going to obtain a statement from this crucial witness, it was now or never. So Chavez interviewed respondent for about ten minutes, spread out over a 45-minute interval to permit emergency room personnel to attend to respondent's injuries. Pet. App. 4a; C.A. App. 451. The interview did not interfere with Martinez's medical treatment, nor – as the district court agreed (Pet. App. 28a) – did Chavez inflict additional pain on an already gravely wounded patient. And, although Martinez strongly incriminated himself in response to petitioner's questions – admitting that he had "pulled" one of the officer's guns and had "pointed" it at the officer (J.A. 11, 15-17) – none of respondent's statements was ever used against him in a criminal case.

As we showed in our opening brief, on these facts petitioner was entitled to qualified immunity. The Fifth Amendment's Compulsory Self-Incrimination Clause cannot be violated without a "use" of compelled testimony against the declarant in a "criminal case" – and no such use has been made of Martinez's statements. The substantive due process protections of the Fourteenth Amendment (although not the fair trial right) *may* be violated by certain extreme forms of coercion, but only in limited circumstances not present here. That right is implicated only by (i) the invasion of a protectible liberty or property interest, with (ii) an intent to harm the victim, and (iii) a cost to the victim that outweighs the public purpose of the interrogation. None of those factors – much less all of them – is present in this case. Finally, even if a Fifth or Fourteenth Amendment right could be established on these facts, at the time of the interrogation neither right was "clearly established"

in the "particularized, and hence more relevant, sense: The contours of the right[s]" were not "sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added).

Respondent and his amici do not take serious issue with any of these propositions. Indeed, respondent's brief rests largely on a series of misconceptions – about the facts, about the law, and about the nature of our arguments.

First the facts: Respondent has taken some surprising liberties with the record. For example, in an apparent effort to downplay his own role in the police shooting, respondent asserts (Br. 2) that Officer Peña "observed that Martinez was not trying to cause injury to Salinas, nor 'trying to fight meaning causing injury to officer Salinas.'" But the testimony cited for this assertion concerned a separate incident involving Officers Salinas and Peña and another suspect a full week before the encounter with respondent. See C.A. App. 188-190. In other places, respondent's account is merely misleading. Salinas may not have "see[n] the knife" when he was conducting the pat down of Martinez (Resp. Br. 2), but he felt it (C.A. App. 200) and "also noticed that there was a large bulge protruding out of [respondent's] right side waistband" (C.A. App. 216). Salinas "never saw Martinez point the gun at Peña" (Resp. Br. 3), but he *did* see it pointed at himself (C.A. App. 69), and *Peña* saw it pointed at her twice and at Salinas at least four times (C.A. App. 185). Respondent intimates (Br. 6) that the district court found that petitioner had caused respondent additional pain, but the court in fact said the opposite, observing that respondent's pain and suffering had been received only at the scene of the shooting. Pet. App. 28a.[1]

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[1] In yet other places respondent makes claims about the evidence where the record is simply silent. The most egregious is the assertion, twice repeated, that the district court based its ruling, in part, on "the audiotape of the interrogation in the emergency room of the hospital." Br. 9. See also Br. 41 ("The actual tape recording is the best evidence of the circumstances Chavez witnessed."). In point of fact, the tape was never placed into the record below, so far as the docket sheet and other documentation reveal. And there is absolutely no reason to suppose that either the district court or the court of appeals ever saw, much less listened to, the tape recording. The district court cited a "police follow-up report," not any tape recording, for its observation that Martinez "was yelling in pain" (Pet. App. 21a); and the court of appeals observed that "[t]he *transcript* of the recorded conversation * * * provides an incontrovertible account of the interview" (Pet. App. 4a (emphasis added)). Indeed, it is precisely because the tape was *not* made part of the record below that respondent has now seen fit to lodge a copy of the tape with this Court. See Respondent's Notice of Lodging of the Tape Recording of Ben Chavez's Interview of Oliverio Martinez. Although respondent invokes Sup. Ct. Rule 32.1 in support of the lodging, the tape recording, so far as we can tell, was *not* "material forming part of the evidence taken in [the] case." This eleventh-hour attempt to supplement the record takes undue advantage of the lodging privilege. See R. STERN, E. GRESSMAN, S. SHAPIRO, & K. GELLER, SUPREME COURT PRACTICE 651-52 (8th ed. 2002) ("Even though there is no reference to this practice in the Court's rules, 'any lawyer can lodge documents with the Court *as long as the material qualifies as the kind of background the Justices could take judicial notice of and refer to in their opinions as generally known facts*'") (quoting former Deputy Clerk Francis Lorson, as in turn quoted in L. CAPLAN, THE TENTH JUSTICE – THE SOLICITOR GENERAL AND THE RULE OF LAW 22 n.17 (1987) (emphasis added)); see also Clerk's Comment to Proposed S. Ct. R. 32.3 (issued Nov. 18, 2002, proposed effective date Jan. 2, 2003) ("parties and *amici curiae* have deluged the Court with * * * cassette tapes").

Most fundamentally, however, respondent misconstrues the Fifth and Fourteenth Amendments and cannot possibly show that his understanding of those amendments – even if right – was clearly established at the time of the interrogation. Petitioner is therefore entitled to qualified immunity.

1. Respondent's Fifth Amendment Rights Were Not Violated

Respondent mischaracterizes our argument about the scope of the Fifth Amendment. We do *not* contend that the Fifth

Amendment is violated only when compelled testimony is used against the declarant *at trial*. The plain language of the Compulsory Self-Incrimination Clause prohibits the use of compelled testimony "in a criminal case" – as we repeatedly stated in our opening brief. See, *e.g.*, Pet. Br. 13, 15, 17, 19, 21. Respondent's statements, however, were never "used" in a "criminal case"; indeed, they were never "used" at all.

Respondent also misreads our argument when he labors to show that the Compulsory Self-Incrimination Clause "applies" in a variety of settings *other* than criminal cases, including "in custodial settings, civil litigation, [and] administrative and legislative proceedings." Resp. Br. 12. Again, we agree, and said just that. Pet. Br. 13. But although the Fifth Amendment *applies* – that is, it may be *invoked* – outside the criminal case itself, it is not until there is an actual *use* of the compelled statement "in a criminal case" that the Fifth Amendment has been breached. That is what this Court's case law confirms in a variety of settings.

The so-called "penalty cases" – which respondent and his amici cite as contrary authority (Resp. Br. 20; Nat'l Police Accountability Proj. Br. 5-6) – are entirely consistent with our reading of the Fifth Amendment. In this line of cases, some governmental authority sought either to coerce testimony or to compel a waiver of immunity from use in a criminal prosecution by threatening the loss of employment or of some similar benefit. The lesson of these cases is that the government cannot *both* compel incriminating testimony (through the coercive effect of penalties) *and* at the same time hold open the possibility of a subsequent prosecution without use immunity. As the Court summarized the point in *Lefkowitz* v. *Turley*, 414 U.S. 70, 84-85 (1973) (emphasis added):

> [G]iven adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. * * * But the State may not insist that appellees waive their Fifth Amendment privilege against

> self-incrimination *and consent to the use of the fruits of the interrogation in any later proceedings brought against them*. Rather, the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. *Hence, if answers are to be required in such circumstances States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.*

As the Court explained in its most recent "penalty case" ruling: "If the State of Kansas offered immunity, the self-incrimination privilege would not be implicated." *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002).

It follows, from the "penalty cases" and the other authorities we have discussed, that the Ninth Circuit *cannot* be right when it says that coercion alone is enough to violate the right against compulsory self-incrimination. Were that the rule, a grant of immunity would *not* permit the government to compel incriminating testimony. This Court's immunity case law, its "penalty cases," and its more recent "foreign prosecution" decision in *United States* v. *Balsys*, 524 U.S. 666 (1998), would all be a dead letter.

Respondent insists, however, that "numerous courts of appeal[s] have held that the Fifth Amendment is violated at the time of the coercion and that the coerced statement need not be introduced at the individual's criminal trial before the Amendment is violated." Br. 25-26. To reiterate: We do not argue that only use *at trial* constitutes a violation; use at any stage of a "criminal case" plainly suffices. See *United States* v. *Hubbell*, 530 U.S. 27, 41 (2000) (making "derivative use" of compelled testimony "in obtaining the indictment against respondent and in preparing its case for trial" constitutes Fifth Amendment violation). Other than the Ninth Circuit, however, no court of appeals (to our knowledge) has held that the Fifth Amendment's Compulsory Self-Incrimination Clause can be violated merely by coercing an incriminating statement from a witness,

without any subsequent use in a criminal case. Certainly none of the cases cited by respondent (Br. 26-27) does so. See, *e.g.*, *United States* v. *North*, 920 F.2d 940 (D.C. Cir. 1990) (holding that a *Kastigar* hearing was required to determine whether the government "used" defendant's immunized testimony "in a criminal case" by exposing one or more witnesses to the testimony); *Clanton* v. *Cooper*, 129 F.3d 1147 (10th Cir. 1997) (coerced statement "used" to effect witness's arrest); *Wilson* v. *Lawrence County*, 260 F.3d 946 (8th Cir. 2001) (coerced confession "used" because, once trial court declined to suppress it, witness entered a guilty plea in order to avoid the death penalty). Compare also *Gray* v. *Spillman*, 925 F.2d 90 (4th Cir. 1991) (cited by respondent but not reaching the issue), with *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J., sitting by designation) (sustaining a defense of qualified immunity in a Section 1983 case founded on a Fifth Amendment claim and noting that the dissenters in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992), made "persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case"), and *Riley* v. *Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (rejecting Fifth Amendment claim, noting that, "[w]hile Fifth Amendment concerns can certainly be implicated prior to trial, the Supreme Court has declared that a Fifth Amendment violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself'").

Finally, respondent and his amici caution that embracing (actually, reiterating) this fundamental limitation on the scope of the Compulsory Self-Incrimination Clause will prompt police officers to ignore the dictates of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and – more darkly – to "'use brute force and torture to extract an involuntary confession from a suspect.'" Resp. Br. 29, 39. See also ACLU Br. 10-20. This parade of horribles is in fact a parade of red herrings. There is no reason in this case to address the question whether a deliberate violation of *Miranda* could ever give rise to a Section 1983 claim; the lower

courts did not address the issue, and the issue is not included within the question presented. It may be added, however, that were police officers to engage in a deliberate pattern and practice of violating *Miranda* – especially if their interrogation methods involved "brute force and torture" (Resp. Br. 29) – the Due Process Clauses of the Fifth and Fourteenth Amendments would be available as a potential safeguard, even though the Compulsory Self-Incrimination Clause would not be.[2]

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[2] In light of *Miranda*'s rooting in the Fifth Amendment, see *Dickerson* v. *United States*, 530 U.S. 428, 435 (2000), it is hard to see how a *Miranda* violation that does not result in an actual *use* of the witness's statement in a criminal case could give rise to a claim under Section 1983. If it could, *Miranda* would be more than just "a constitutional rule" (530 U.S. at 437) and more than just a prophylactic protection to reduce the risk of undetected constitutional violations – it would afford protections of a sort the Fifth Amendment does not speak to at all, namely protections for one *not* ever involved in "any criminal case," U.S. CONST. Amend. V. As Justice Marshall explained in *New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (dissent):

> If a bomb is about to explode or the public is otherwise imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* v. *Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

See also *id.* at 664 (O'Connor, J., concurring in part and dissenting in part) ("*Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered * * *.").

2. Respondent's Due Process Rights Were Not Violated

As we explained in our opening brief (at 21-27), the Due Process Clause affords at least two distinct protections to individuals subjected to coercive interrogation. The first protection – reflected in decisions such as *Brown* v. *Mississippi*, 297 U.S. 278 (1936), as well as *every* authority on which the Ninth Circuit relied both here and in *Cooper* for the proposition that coercive interrogation alone violates the Fourteenth Amendment (see Pet. App. 7a-8a, 10a-11a; 963 F.2d at 1244-1249) – ensures that individuals will not be convicted on the basis of an involuntary confession. This "fair trial" right is distinct from the substantive due process right not to be subjected to police tactics that "shock the conscience." Such extreme conduct may run afoul of the Due Process Clause even when it does not result in a statement that is later offered at trial. See *Wilkins* v. *May*, 872 F.2d 190, 195 (7th Cir. 1989), cert. denied, 493 U.S. 1026 (1990); *United States* v. *Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir.), cert. denied, 464 U.S. 908 (1983).

The Ninth Circuit's cardinal error was conflating these two distinct protections. It supposed that any police interrogation that results in an "involuntary" statement for purposes of the "fair trial" right must likewise give rise to a substantive due process claim *even when the resulting statement is not used against the witness*. That is simply not so, as the hypothetical example outlined in our opening brief (at 26-27) illustrates. Respondent now makes the same mistake. He argues that "constitutional violations occur when the coercion happens" (Br. 32) – a proposition we do not dispute if, but only if, we are talking about coercion that truly shocks the conscience.[3]

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[3] Mimicking the Ninth Circuit's confusion, respondent intermingles both "fair trial" and substantive due process cases in the string cites purportedly showing that mere coercion suffices to state a due process violation. See Br. 32 n.18. In several of these cases, the government in fact used the coerced statement at trial or in related proceedings. See, *e.g.*, *Duncan* v. *Nelson*, 466 F.2d 939 (7th Cir. 1972) (coerced confession admitted into evidence, resulting in conviction and imprisonment); *Wilson* v. *Lawrence County*, 260 F.3d 946 (8th Cir. 2001) (confession held to be admissible, resulting in guilty plea designed to avoid death penalty); *Weaver* v. *Brenner*, 40 F.3d 527 (2d Cir. 1994) (confession used to obtain grand jury indictment).

Coercion alone, however, is insufficient, even if it results in an "involuntary" statement, unless the coercive conduct reaches "shocks the conscience" proportions.

Of course, even a "shocks the conscience" finding may not be enough. Substantive due process analysis – like any other inquiry under the Due Process Clause – "must begin with a careful description of the asserted right." *Reno* v. *Flores*, 507 U.S. 292, 302 (1993). Respondent never tells us in what respect his liberty or property was infringed by petitioner's interrogation. There is no evidence that the questioning caused Martinez pain; the district court found that it did not. Pet. App. 28a. There is no evidence that the interrogation interfered with respondent's medical treatment – and respondent does not argue otherwise. And as we explained in our opening brief, not only is there no right, "deeply rooted in this Nation's history and tradition" (*Bowers* v. *Hardwick*, 478 U.S. 186, 192 (1986)), to be free of police questioning, but quite the contrary is true. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966). The duty to assist law enforcement – not the right to avoid questioning – is a "deeply rooted social obligation." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980).

In the absence of a cognizable liberty or property interest, the Due Process Clause – substantive or otherwise – cannot be violated. As we noted in our opening brief (at 31-36), however, that is just one of several difficulties with respondent's substantive due process claim in this case. Under *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), Chavez cannot be liable under the Due Process Clause unless he acted with the intent to harm Martinez. Respondent makes no such claim, and there is no such evidence. Instead, respondent and his amici

(Resp. Br. 35-36; ACLU Br. 24-29) urge that a lower standard – "deliberate indifference" – should suffice to state a substantive due process claim in this case. In respondent's view, "Chavez had the luxury of having time to make an unhurried judgment, the chance for repeated reflection, and no *valid* competing obligations." Br. 36 (emphasis in the original). According to respondent, petitioner should have "wait[ed] until Martinez could give a free and voluntary statement after being advised of his constitutional rights protected by Miranda." *Ibid.* Because petitioner "had time to deliberate," he should be held to the standard of "deliberate indifference." *Ibid.*

That is a complete caricature of the interrogation in this case. When Chavez encountered respondent, he was gravely wounded, was in evident pain, and repeatedly told petitioner that he was about to die. Pet. App. 21a. Petitioner, unlike the officers in *Mincey* v. *Arizona*, 437 U.S. 385 (1978), did *not* have "the luxury" of time (Resp. Br. 36). He could *not* wait until later to secure Martinez's statement. Later might well have been too late; petitioner, too, believed that Martinez would die from his injuries. C.A. App. 38, 114, 452-453; J.A. 11-12, 20-22. So Chavez took ten minutes worth of statements over a 45-minute span (to permit emergency medical personnel to minister to respondent's wounds).

Circumstances like these – where an officer's decisions have to be made "'in haste, under pressure, and frequently without the luxury of a second chance'" (*County of Sacramento* v. *Lewis*, 523 U.S. at 853 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986))) – do not permit the degree of "deliberation" required for a "deliberate indifference" standard. Respondent was therefore required to plead and prove that petitioner impaired his liberty with an intent to harm him. He has not done so – and for that independent reason, his substantive due process claim must fail.

But there is yet another infirmity with respondent's Fourteenth Amendment claim: The court of appeals never considered *the reasons* for the interrogation in this case, and

therefore never weighed those reasons against the intrusiveness (if any) of Chavez's questioning. As this Court explained in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990), "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."

The Ninth Circuit's failure to engage in any such balancing is a byproduct of its basic misconception about the relevant due process analysis. When it comes to the "fair trial" right under the Due Process Clause, there is nothing to balance: Persons have a right to a fair trial, free from the taint of coerced confessions, regardless of the government's competing goals; Al Capone gets the same fair trial that a jaywalker does. But when the government is *not* seeking to use an allegedly coerced statement against the witness – when the "fair trial" right is not involved – the due process inquiry must take account of the government's reasons for asking the questions in the first place.

Here, Chavez's reasons for interrogating Martinez were surpassingly important. Respondent was a key witness to an officer-involved shooting – the injured party himself – and seemingly he was about to die. Chavez was seeking to uncover the facts. Although respondent now asserts (Br. 10) that there is no evidence that "[p]etitioner was conducting an investigation into police misconduct," he admits (*ibid.*) that Chavez was seeking "to find the truth" and to determine "if [a] crime had been committed." C.A. App. 98-99; J.A. 20-22. And respondent does not dispute, nor could he, that these are reasons of substantial importance.

Yet the court of appeals never considered them. Believing as it did that a due process claim is stated whenever the government coerces a statement from a witness, the Ninth Circuit never asked *why* Ben Chavez spent ten minutes in the emergency room with Oliverio Martinez on November 28, 1997. Had it done so, it would have concluded that the urgent

need to secure respondent's statement outweighed any intrusiveness occasioned by the interrogation.[4]

3. Even If Respondent's Constitutional Rights *Were* Violated, Those Rights Were Not "Clearly Established" At The Time Of The Interrogation

Even if respondent could establish a Fifth or Fourteenth Amendment claim on these facts, he still would have to show that the constitutional right at stake was "clearly established" in the "particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

Respondent reads the law differently. According to respondent, "[t]he relevant inquiry" in determining whether qualified immunity is available "is whether Chavez acted reasonabl[y] given the circumstances he confronted." Br. 44. That is not the

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[4] Respondent suggests, in passing (Br. 11), that this due process issue is not properly before the Court because "[p]etitioner raised only a Fifth Amendment issue in the Petition." In fact, however, the third question presented in the petition read as follows: "Whether the Ninth Circuit panel correctly held that the conduct of this investigating officer was so offensive as to deny him qualified immunity." The answer to that question turns on "whether plaintiff's allegations, if true, establish a constitutional violation," and if so, whether that violation was "clearly established" at the time of the interrogation. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Here, the court of appeals answered the first question "yes" by deciding in respondent's favor *both* the Fifth and Fourteenth Amendment claims. Accordingly, to answer the qualified immunity question in this case, petitioner is constrained to show that the court of appeals erred on *both* constitutional issues.

correct standard. "Acting reasonably given the circumstances" is a pure negligence rule. By its nature, it permits a jury to second-guess an official's decision if it finds, in retrospect, that the officer should have acted differently.

The qualified immunity defense is designed to spare government officials just such second-guessing, as this Court emphasized in *Saucier*. The question in that case was whether a military police officer was entitled to qualified immunity in an action alleging excessive force in violation of the Fourth Amendment. The Court noted that an "objective reasonableness standard" applies to the question whether the officer's force was excessive. But "[t]he qualified immunity inquiry * * * has a further dimension." 533 U.S. at 205.

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Ibid. Unless the governing legal rules "put the officer on notice that his conduct would be *clearly unlawful*, summary judgment based on qualified immunity is appropriate." *Id.* at 202 (emphasis added).[5]

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[5] Recognizing that existing qualified immunity principles are unfavorable to respondent's claim, amicus curiae ATLA proposes that current law be jettisoned in favor of a standard that requires police officers to be "capable of making fine legal distinctions." Br. 15. Even in such a brave new world, however, petitioner would still be entitled to qualified immunity, in light of this Court's opinion in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990), and the

Respondent does not even attempt to show that Chavez's interrogation in this case violated "clearly established" Fifth Amendment rights "in light of the specific context of the case." *Saucier*, 533 U.S. at 202. How could he? In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), this Court stated that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."

Even if this statement is dictum (which we do not concede), surely it precludes a holding that the *opposite* proposition was "clearly established" – *i.e.*, that the Fifth Amendment can be violated by conduct that occurs only *before* trial. And the Ninth Circuit's previous decision in *Cooper* – in addition to being inconsistent with this Court's cases and the subject of withering criticism from other circuits – did not "clearly establish" that questioning like petitioner's would constitute a violation of the Fifth Amendment. As we explained in our opening brief (at 39 n.14), and as respondent makes no effort to dispute, the court of appeals in *Cooper* did not actually address the question whether the Fifth Amendment (as opposed to the Fourteenth Amendment) may be violated where no use is made of the compelled statement. Although the panel in this case read *Cooper* to have resolved this question, Chavez cannot be faulted because he failed to draw the same inference.[6]

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overwhelming weight of authority that was contrary to the Ninth Circuit's decision in *Cooper*.

[6] As we noted in our opening brief (at 40), the Ninth Circuit's understanding of the Fifth Amendment has been uniformly rejected by other circuits. Amicus Curiae Association of Trial Lawyers of America contends, however, that "[t]he law of other jurisdictions" should not control the question whether a proposition is "clearly established" if there is "authority on the particular question in the Supreme Court, local federal circuit or district court." Br. 19. Here, of course, there *is* "authority in the Supreme Court" – *Verdugo-Urquidez* – so ATLA's

Nor was it "clearly established" that an interrogation like the one conducted in this case would violate the Due Process Clause. The Ninth Circuit's contrary view rested on its belief that *Mincey* v. *Arizona*, 437 U.S. 385 (1978), had held "a virtually indistinguishable interrogation" to be unconstitutional. Pet. App. 12a-14a. But as we explained in our opening brief (at 45-49), with no rejoinder from respondent, *Mincey* sheds no relevant light on this case at all. First and foremost, *Mincey* was a "fair trial" case; the question there was whether Mincey's statements were involuntary and thus inadmissible at trial. 437 U.S. at 402. For the reasons stated here and in our opening brief, the "fair trial" cases do not control the quite different analysis that applies when an allegedly coerced statement is not being offered into evidence. What is more, the due process calculus in *Mincey* was far more favorable to a due process claim: Mincey was questioned over a four-hour period; he had to write down his answers because tubes had been inserted in his throat and nose, which made him unable to speak; and Mincey's "responses" were especially unreliable because they had been "reconstructed" after the fact by the interviewing officer. *Id.* at 396 & n.11, 398-399, 401. Conversely, there was no exigency to the questioning in *Mincey*; unlike petitioner –

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argument fails on its own terms. But ATLA's argument is conceptually flawed in any event. There is only one federal "law." To refer to the *case law* of *other circuits* as if it were "[t]he law of other jurisdictions," in the same manner in which different States' laws may be different, is confused. Circuit splits reflect not that the "law" is different in different circuits, but that jurists of reason differ at a particular time as to what the uniform federal law *is* – which strongly supports qualified immunity. The fact that there is only one body of federal law is why, when this Court disagrees with a decision of a circuit, "it is not accurate to say that this Court's decision * * * 'changed' the law that previously prevailed in the * * * Circuit." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994); see also *Lockhart* v. *Fretwell*, 506 U.S. 364 (1993) (the fact that an Eighth Circuit precedent would have supported a habeas petitioner's argument at the time of his sentencing proceeding does not establish "prejudice" if that precedent was subsequently overruled).

who told Chavez repeatedly that he thought he was about to die – Mincey proposed to his interrogator that they suspend the questioning and "rap tomarrow [*sic*]." *Id.* at 400-401.

Courts should be especially reluctant to deny qualified immunity where the underlying constitutional right – here, the right (if any) to substantive due process – turns on a balancing of competing interests. As ATLA recognizes in its amicus brief, "where a constitutional right depends upon the balancing of interests, a public official cannot be expected to know in advance how those interests will be balanced, and therefore the right is not clearly established for the purpose of imposing liability." Br. 17. In the present case, moreover, petitioner would have needed remarkable intuition to anticipate that the balance might be struck against him, since a wide array of other circuits – on facts involving far less justification for police questioning, and often far more aggressive questioning – had *rejected* due process claims. See Pet. Br. 43-45. Again, respondent offers no answers.

* * *

Because respondent's statements were never used against him, he has no cognizable claim under either the Fifth Amendment or the "fair trial" protections of the Due Process Clause. And, although coercion alone may sometimes state a *substantive* due process claim, it cannot do so unless there is conduct that "shocks the conscience," is committed with an intent to harm, and impairs a liberty or property interest that outweighs the competing governmental purpose. None of these conditions, let alone all of them, has been shown here. In all events, neither a Fifth nor a Fourteenth Amendment right was "clearly established" at the time of the interrogation. To the contrary: Officer Chavez was doing a hard job under tragic and trying circumstances. He was entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

LAWRENCE S. ROBBINS*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

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No. 01-1444

In the Supreme Court of the United States

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v.

OLIVERIO MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

37 pp

QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. 1983 alleging that his questioning of respondent was impermissibly coercive and violated respondent's Fifth and Fourteenth Amendment rights, where no statement made by respondent has been used against him in a criminal case.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and the interpretation of the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Because of its role in the investigation and prosecution of federal crimes, the United States has a substantial interest in the interpretation of the Fifth Amendment Self-Incrimination Clause and (because of its implications for interpreting the analogous provision of the Fifth Amendment) the Fourteenth Amendment Due Process Clause. The United States also has an interest in effective deterrence of unconstiutional

conduct by government employees and in the faithful application of the nation's civil rights laws.

STATEMENT

1. On the evening of November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating suspected narcotics activity near a vacant lot in Oxnard, California. Pet. App. 2a. While questioning an individual, they heard a bicycle approaching on the unlit path that crossed the lot. Officer Salinas ordered the rider, respondent Oliverio Martinez, to dismount, spread his legs, and place his hands behind his head. Respondent complied. *Id.* at 2a-3a.

During a protective pat-down, Officer Salinas discovered a knife in respondent's waistband. Pet. App. 3a; C.A. App. 121. Salinas notified Pena and pulled respondent's hands from behind his head to place him in handcuffs. Salinas maintains that respondent attempted to flee; respondent claims that he offered no resistance and Salinas tackled him without provocation. A struggle ensued. Officers Salinas and Pena testified that respondent drew Salinas' pistol and pointed it at them (see C.A. App. 68-71, 183-185); respondent alleges that he grabbed Salinas' hand to stop him as he drew his pistol from its holster. *Id.* at 85. It is undisputed, however, that Officer Salinas shouted "[h]e's got my gun." Pet. App. 3a. Officer Pena drew her pistol and fired at respondent. One bullet struck respondent in the face, injuring his optic nerve and blinding him. Another bullet fractured a vertebra, paralyzing his legs. Three bullets struck his leg. The officers handcuffed respondent and called for assistance. *Ibid.*; C.A. App. 62.

Petitioner Ben Chavez, a police sergeant and patrol supervisor, arrived at the scene a short time later along with paramedics. The handcuffs were removed from respondent. C.A. App. 271. After speaking with Salinas and Pena about what had happened, petitioner ordered Salinas and Pena separated so they would not discuss the incident. *Id.* at 39, 100,

116. Paramedics stabilized respondent for transport to a hospital emergency room. Petitioner accompanied respondent in the ambulance. *Id.* at 270, 275.

After arriving at the hospital, and in the presence of medical personnel, petitioner conducted a tape-recorded interview of respondent "intermittently for approximately 45 minutes." Pet. App. 27a. Because petitioner periodically stopped questioning and waited outside the room as medical personnel treated respondent, the interview consumed only approximately 10 minutes of tape. See J.A. 6-20. Petitioner identified himself as a policeman and asked respondent to "tell [him] what happened." J.A. 9. Respondent answered that he had "fought" with the police but did not know why they had fought. Petitioner asked respondent whether he had "grab[bed] the gun of the other policeman." J.A. 9-10. Respondent said that he had "pulled the gun" from Salinas' holster (J.A. 13) and "pointed it" at the police. J.A. 14. Respondent complained repeatedly about pain, *e.g.*, J.A. 8, 16, 17, 18, said that he wanted treatment, J.A. 12, 13, 17, 18, and stated several times that he believed he was dying. J.A. 7, 8, 9, 11, 12, 19. In the middle of the interview, respondent said "I am not telling you anything until they treat me." J.A. 12. Petitioner responded that medical personnel were treating respondent and he wanted to get respondent's side of the story so he did not have to rely solely on Salinas' and Pena's description of events. J.A. 13. When respondent later said "I don't want to say anything anymore" (J.A. 17), petitioner asked respondent if he thought he was going to die (J.A. 18), assured him "the doctors are going to help you with all they can do" (J.A. 19), and ended the interview. *Ibid.* Near the end of the interview, respondent said that he had been drinking that day and had used heroin that evening. J.A. 15-16. It is undisputed that petitioner did not recite *Miranda* warnings. C.A. App. 113. Respondent has not been charged with any crime stemming from the incident.

2. Respondent filed a complaint under 42 U.S.C. 1983 against Sergeant Chavez, Officers Salinas and Pena, several other officers, and the City of Oxnard. Respondent alleged that the officers violated his constitutional rights by stopping him without probable cause and using excessive force (in violation of the Fourth Amendment), tampering with evidence (in violation of the Fourteenth Amendment), inflicting cruel and usual punishment (presumably in violation of the Eighth Amendment or Fourteenth Amendment), and subjecting him to coercive interrogation (in violation of the Fifth and Fourteenth Amendments).[1] Pet. App. 4a-5a. The defendants asserted a qualified immunity defense. Among other things, petitioner argued that it was not "clearly established" that the circumstances of his questioning of respondent rendered it unconstitutionally coercive (C.A. App. 434-443), and that precedent did not clearly indicate that it was unconstitutional for an officer "to preserve the key non-police witness's account of events before the individual expires." *Id.* at 445.

The district court granted respondent partial summary judgment on his Fifth and Fourteenth Amendment claims arising from the interrogation. Pet. App. 19a-30a. The district court held that petitioner had "coerced" (*id.* at 23a) respondent's statement in violation of his Fifth and Fourteenth Amendment rights, emphasizing the seriousness of respondent's injuries and the fact that questioning persisted despite respondent's request for medical treatment and statements that he did not wish to talk. The court denied respondent summary judgment on his claims that petitioner had violated his Eighth Amendment rights through deliberate indifference to his medical needs and by inflicting cruel and unusual punishment. Noting that respondent was "not a convicted inmate" (*ibid.*), the court construed those claims as a claim of deliberate indifference to medical needs in violation of the Due Process Clause of the Fourteenth Amendment, but denied summary judgment "because there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment." *Id.* at 24a.[2]

[1] Respondent also claimed that the City and police supervisors had failed to train and supervise the officers adequately, and alleged that the defendants had committed various state-law torts. Pet. App. 16a. Respondent later dismissed these claims, and they are not at issue here. *Ibid.*

The court then held that petitioner was not entitled to qualified immunity, stating that "[t]he law against coerced confessions was clearly established at the time of [respondent's] interview," and "no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries * * * was constitutionally permissible." Pet. App. 29a. The court rejected petitioner's claim that he was merely trying to preserve evidence and was not "trying to build a criminal case against a man who was about to expire" (*id.* at 28a-29a), stating that petitioner had no way of knowing "whether or not a prosecutor would charge [respondent] if he survived." *Id.* at 29a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court first concluded that petitioner had "violated the Fifth and Fourteenth Amendments by subjecting [respondent] to a coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds." *Id.* at 6a. Relying on its prior en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.), cert. denied, 506 U.S. 953 (1992), the court held that petitioner had violated respondent's Fifth Amendment rights when he "'actively compelled and coerced' [respondent] to utter statements that [he] could reasonably believe might be used in a criminal prosecution."

[2] The district court also denied respondent summary judgment on his claim that his detention violated the Fourth Amendment, concluding there was a genuine issue of material fact regarding the officers' reasonable suspicion for stopping him. Pet. App. 25a.

Pet. App. 9a. Although the statements "were not used against [respondent] in a criminal proceeding" (*ibid.*), the court, again relying on *Cooper*, dismissed that fact as immaterial because "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity.'" *Ibid.* (quoting *Cooper*, 963 F.2d at 1239 (internal quotation marks omitted)).[3] The court of appeals also concluded that because due process is offended by "coercive behavior of law-enforcement officers in pursuit of a confession" (*id.* at 10a-11a (quoting *Cooper*, 963 F.2d at 1244-1245)), "a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." *Id.* at 10a.

The court next held that qualified immunity was not available because the limits on interrogation were clearly established at the time of the incident (Pet. App. 11a), emphasizing that this Court had "held a virtually indistinguishable interrogation unconstitutional in *Mincey* v. *Arizona*, [437 U.S. 385 (1978)]." *Id.* at 12a. The court did not address petitioner's claim that the questioning was undertaken not to obtain incriminating statements, but to preserve the account of a key witness whom he thought to be dying.

SUMMARY OF ARGUMENT

Respondent's complaint about petitioner's tactics in interviewing him, when statements elicited were never used against respondent in any forum, does not state a violation of respondent's Fifth and Fourteenth Amendment rights, much

[3] Although the court "recognize[d] the existence of Supreme Court dicta to the contrary" (Pet. App. 10a n.3 (citing *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)), the court declined to follow it, stating that "[w]here the two are at odds, * * * we are bound to follow our own binding precedent rather than Supreme Court dicta." *Ibid.*

less a clearly established one. In a variety of contexts, this Court has made clear that so long as the government makes no use of a compelled statement in a criminal case, the Fifth Amendment is not violated. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Similarly, this Court's cases addressing the voluntariness of confessions under the Fourteenth Amendment Due Process Clause establish only a procedural "right to be free of a conviction based upon a coerced confession" (*Jackson* v. *Denno*, 378 U.S. 368, 377 (1964)) and reject the notion that, absent use of the coerced confession in a criminal proceeding, "the victim has a legal grievance against the police." *Lyons* v. *Oklahoma*, 322 U.S. 596, 605 (1944).

To be sure, the Constitution does prohibit police misconduct "so brutal and so offensive to human dignity" that it "shocks the conscience." *Rochin* v. *California*, 342 U.S. 165, 174, 172 (1952). But no such claim can be made on the facts of this case. Although respondent undoubtedly was in grave condition and suffering great pain because of his preexisting injuries, petitioner did not touch respondent or employ such harmful psychological techniques that his conduct was "arbitrary in the constitutional sense." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). And far from being "unjustifiable by any government interest" (*id.* at 849), petitioner was seeking to preserve the statement of the victim of (and thus the key witness to) a police shooting. Petitioner's conduct, rather than constituting sanctionable police misconduct, had the potential to preserve evidence of possible police misconduct. More broadly, the court of appeals' recognition of a broad new right to be free of coercive questioning, irrespective of the use to which resulting statements are put, will undermine legitimate law-enforcement efforts to obtain potentially life-saving information during emergencies.

Even were the Court to recognize such a right, qualified immunity is appropriate because it was not clearly estab-

lished at the time of petitioner's conduct. The Ninth Circuit stands alone in recognizing a Fifth Amendment right to be free of coercive questioning regardless of the use of resulting statements, and it has acknowledged that its view conflicts with this Court's statement in *Verdugo-Urquidez* that the Fifth Amendment is not violated unless a compelled statement is used at trial. Although that statement may be dicta, a police officer should not be subject to liability for heeding an authoritative and clear statement from this Court. Moreover, there is no allegation that petitioner engaged in the sort of brutal physical or psychological coercion that would have put a reasonable officer on notice that his conduct was so "egregious" (*Lewis*, 523 U.S. at 846) that it clearly violated respondent's substantive due process rights.

ARGUMENT

THE COURT OF APPEALS ERRED IN DENYING PETITIONER QUALIFIED IMMUNITY

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The court first must decide whether the facts as alleged state a violation of a constitutional right. If they do, the court must then decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Respondent's effort to obtain monetary damages for the claimed denial of his Fifth and Fourteenth Amendment rights fails on both counts.

A. Because Respondent's Statements Were Not Used Against Him In A Criminal Case, His Fifth Amendment Right Against Compelled Self-Incrimination Was Not Violated

1. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." By its own terms, the provision does not prohibit all compelled self-incrimination, only that occurring "in [a] criminal case." Of course, this Court has not strictly limited the Fifth Amendment's protections to individuals testifying during criminal trials. See, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973) (noting that Fifth Amendment includes a broader "privilege[] * * * not to answer official questions put to [a witness] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings"). While the Fifth Amendment privilege may be invoked during an investigation to prevent Fifth Amendment rights from being undermined in a later criminal proceeding, see *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974), the Fifth Amendment is not violated until a compelled statement has been used "in [a] criminal case." As this Court has observed, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*"[4] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added; citation omitted); accord *New York* v. *Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) ("All the Fifth Amendment forbids

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[4] This Court has made clear that use at trial is not the *only* use "in [a] criminal case" prohibited by the Fifth Amendment. See, *e.g.*, *Mitchell* v. *United States*, 526 U.S. 314, 327 (1999) ("[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law").

is the introduction of coerced statements at trial."); cf. *Weatherford* v. *Bursey*, 429 U.S. 545, 556, 558 (1977) (holding that no Sixth Amendment violation has occurred where interference with assistance of counsel has no effect on trial); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964) (defendant "was denied the basic protections of th[e] [Sixth Amendment] guarantee when *there was used against him at his trial* evidence of his own incriminating words," deliberately elicited after indictment in the absence of counsel) (emphasis added).

2. Numerous distinctive aspects of Fifth Amendment doctrine confirm that the Self-Incrimination Clause provides a "*trial* right" for criminal defendants (*Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (quoting *Verdugo-Urquidez*, 494 U.S. at 264)), rather than a limit on the primary conduct of law-enforcement officers in the field. First, this Court has long held that the Fifth Amendment does not bar the compulsion of incriminating testimony so long as the witness is afforded immunity coextensive with that offered by the Constitution. See, *e.g.*, *Brown* v. *Walker*, 161 U.S. 591, 610 (1896); cf. *Counselman* v. *Hitchcock*, 142 U.S. 547, 564-565 (1892). In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court held that a witness could be compelled to testify despite his invocation of the privilege if given immunity under 18 U.S.C. 6002 "from the use of compelled testimony, as well as evidence derived * * * therefrom" (*id.* at 453), reasoning that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination." *Ibid.* As the Court explained in *Brown* v. *Walker*, "since [the witness'] testimony could not be used against him in any criminal case * , he is not compelled to be a witness 'against himself.'" 161 U.S. at 603-604 (quoting *Ex parte Cohen*, 38 P. 364, 365 (Cal. 1894)). Accord *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002) ("If the State of Kansas offered immunity, the self-incrimination privilege would not be

implicated.") (plurality opinion); *id.* at 2043-2045 (Stevens, J., dissenting). See generally Steven D. Clymer, *Are Police Free to Disregard* Miranda?, 112 Yale L.J. (forthcoming Dec. 2002) (immunity doctrine "demonstrates that the [Fifth Amendment] permits compulsion; it only imposes later restrictions on the government when it compels answers").

This Court's recent decision in *United States* v. *Balsys*, 524 U.S. 666 (1998), allowing the compulsion of testimony despite fears of foreign prosecution, underscores that the Fifth Amendment establishes a trial right rather than a limit on primary conduct. In *Balsys*, federal investigators sought the testimony of a person suspected of having participated in Nazi persecution during World War II. The witness claimed the Fifth Amendment privilege against self-incrimination based on his fear of prosecution abroad. The Court rejected his assertion of the privilege, noting that while he was being compelled to be a witness against himself, a foreign prosecution did not represent "a 'criminal case' for purposes of the privilege against self-incrimination." 524 U.S. at 672.

The Court rejected the argument that recognition of the privilege under those circumstances was necessary to protect a constitutional interest in "the inviolability of the human personality" (524 U.S. at 691 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964))—the very rationale on which the Ninth Circuit based its decision. See Pet. App. 9a (quoting *Cooper* v. *Dupnik*, 963 F.2d 1220, 1239, cert. denied, 506 U.S. 953 (1992)). The Court reasoned that if that rationale were correct, a violation of the Fifth Amendment, like a violation of the Fourth Amendment, would be "complete at the moment of illicit intrusion, whatever use may or may not later be made of [its] fruits." 524 U.S. at 692. "The Fifth Amendment tradition, however, offers no such degree of protection. If the Government is ready to provide the requisite use and derivative use immunity, the protection goes no further: no violation of personality is

recognized." *Ibid.* As the *Balsys* Court noted, the deficiency of the "inviolability of the human personality" rationale is also apparent from the fact that witnesses constitutionally can be compelled to testify "when a witness's response will raise no fear of criminal penalty" (*ibid.*), and can be compelled to produce all manner of incriminating (but personal) non-testimonial evidence, such as blood specimens, *Schmerber* v. *California*, 384 U.S. 757, 762 (1966), voice exemplars, *United States* v. *Dionisio*, 410 U.S. 1 (1973), and handwriting samples. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967). See also *Doe* v. *United States*, 487 U.S. 201, 213 n.11 (1988) (finding no violation of the privilege "[d]espite the impact upon the inviolability of the human personality"). See generally Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 687-688 (1968) ("as an argument for the [Fifth Amendment] privilege[,] * * * privacy simply will not parse").

In a variety of other contexts, the Court has confirmed that the Fifth Amendment is not violated by compelled testimony so long as the government makes no use of it in a criminal case. In the so-called "penalty cases," for example, the Court has held that governments may use threats of economic penalties, such as job termination or loss of government contracts, to elicit statements if there are established restrictions on their later use in criminal cases. See, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. at 84, 85 ("the State may insist that [contractors] * * * either respond to relevant inquiries about the performance of their contracts or suffer cancellation," but "the State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence"); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977) ("[p]ublic employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their

official duties if they have not been required to surrender their constitutional immunity" against later use of statements in criminal proceedings). See also *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J.) ("language in [the penalty cases] suggests that the right against self-incrimination is not violated by the mere compulsion of statements, without a compelled waiver of the Fifth Amendment privilege or the use of the compelled statements against the maker in a criminal proceeding"), cert. denied, 516 U.S. 824 (1995).

Likewise, in *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 561-562 (1990), the Court held that the Fifth Amendment did not privilege a custodial mother's refusal to comply with a court order to produce a child despite her claim that the act of production would incriminate her, but noted that "the Fifth Amendment protections are not * * * necessarily unavailable to the person who complies with the regulatory requirement [to produce] after invoking the privilege and subsequently faces prosecution." And in *Minnesota* v. *Murphy*, 465 U.S. 420, 436 n.7 (1984), the Court wrote that a state may compel probationers to "answer[] * * * even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding."

3. The differences between the Court's Fourth and Fifth Amendment jurisprudence underscore the conclusion that the Fifth Amendment is violated only by the use of compelled testimony, rather than by out-of-court acts of compulsion. In contrast to the Fifth Amendment trial right, the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *Verdugo-Urquidez*, 494 U.S. at 264; accord

Balsys, 524 U.S. at 692. Because the constitutional violation is already complete, the "admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation," by application of a judicially created exclusionary rule. *United States* v. *Janis*, 428 U.S. 433, 443 (1976). "In contrast * * * the Fifth Amendment[] [is a] direct command against the admission of compelled testimony." *Ibid.* As the Court noted in *Adams* v. *Maryland*, 347 U.S. 179 (1954), "a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute." *Id.* at 181.[5]

That difference reflects the Fifth Amendment's core purpose. While the Fourth Amendment protects antecedent interests in privacy and so imposes limits on the primary conduct of law enforcement officers in the field, the Fifth Amendment does not "serve some value necessarily divorced

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[5] Because *Miranda* warnings safeguard this "fundamental *trial* right" of criminal defendants, *Withrow*, 507 U.S. at 691; cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973) (noting that "the basis for [the *Miranda*] decision was the need to protect the fairness of the trial itself"), this Court has held that claimed *Miranda* violations in state-court proceedings—unlike Fourth Amendment claims, see *Stone* v. *Powell*, 428 U.S. 465 (1976)—are cognizable on federal habeas review. *Withrow*, 507 U.S. at 686-687, 691-693. There is language in some of the Court's opinions suggesting that the "Fifth Amendment privilege * * * is not an adjunct to the ascertainment of truth" (*Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966)), and serves values more "like the guarantees of the Fourth Amendment." *Ibid.* That language was not necessary to *Tehan*'s holding declining to apply retroactively the adverse comment rule of *Griffin* v. *California*, 380 U.S. 609 (1965). Moreover, that language is inconsistent with prevailing Fifth Amendment doctrine holding that the privilege is a trial right rather than a restriction on primary conduct, and conflicts with the rationale of both *Withrow*, *supra*, and *Balsys*, 524 U.S. at 692 (distinguishing operation of Fifth Amendment from that of Fourth Amendment).

from the correct ascertainment of guilt." *Withrow*, 507 U.S. at 692. Rather, the Fifth Amendment's "*sole concern* is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." *Kastigar*, 406 U.S. at 453 (emphasis added; internal quotation marks omitted; ellipses in original); *Brown* v. *Walker*, 161 U.S. at 605-606 ("The design of the constitutional privilege is * * * to protect [the witness] against being compelled to furnish evidence to convict him of a criminal charge.").[6]

Finally, the difference in the function of the Fourth and Fifth Amendments is reflected in the more elaborate exigent circumstances jurisprudence under the Fourth Amendment. Because the Fourth Amendment regulates primary police conduct, this Court has long recognized a need to exempt police efforts to respond to exigent circumstances. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948). In the Fifth Amendment context, the need for such an exemption is reduced, because the Amendment itself does not directly regulate primary police conduct. Accordingly, this Court has recognized only a limited public safety exception to the *Miranda* rule, see *New York* v. *Quarles*, 467 U.S. at 655-658, rather than a broad exigent circumstances doctrine. And, precisely because the Fifth Amendment does not directly

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[6] To be sure, the Court has suggested that the Fifth Amendment also furthers other goals, including the one relied upon by the Ninth Circuit—guarding against interrogation practices that are "destructive of human dignity." Pet. App. 9a (quoting *Cooper*, 963 F.2d at 1239 (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 457-458 (1966)). However, just a week after *Miranda*, the Court cautioned that the Fifth Amendment "has never been given the full scope which the values it helps to protect suggest." *Schmerber*, 384 U.S. at 762. Since then, the Court has cautioned against resting decisions on such "highly general statements of policy," noting that they do not "even purport to weigh" the full range of concerns in addressing the Fifth Amendment's scope, and has expressly rejected the "human dignity" rationale. *Balsys*, 524 U.S. at 691.

regulate primary police conduct, some Justices questioned the need for even a limited exception. *Id.* at 686 (Marshall, J., dissenting); see also pp. 23-25, *infra* (arguing that standards for admitting evidence should not be equated with standards for permissible police conduct).

4. Because the exclusion of a compelled confession from evidence in a criminal case itself prevents a violation of the Self-Incrimination Clause, there is no need for a *Bivens* action to remedy a violation. Cf. *DeShawn E.* v. *Safir*, 156 F.3d 340, 346 (2d Cir. 1998) (appropriate course under Fifth Amendment is "'exclusion from evidence of * * * self-incriminating statements' and 'not a § 1983 action'"). As this Court has recently emphasized, there is no need for the courts to infer a *Bivens* action when doing so is unnecessary to remedy the underlying constitutional violation. See *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 521 (2001). While *Bivens* actions are a necessary remedy in the Fourth Amendment context, where the exclusionary rule is itself "too late" to remedy a violation (*United States* v. *Calandra*, 414 U.S. 338, 347 (1974)), there is no comparable unmet need here. Cf. *New York* v. *Quarles*, 467 U.S. at 669 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations, and the suppression of such incriminations should by itself produce the optimal enforcement of the *Miranda* rule.").[7]

[7] Moreover, the relevant state actor in most Self-Incrimination Clause contexts would be the prosecutor who attempted to introduce the statement, who would be entitled to absolute immunity from such a claim. See *Burns* v. *Reed*, 500 U.S. 478, 492 (1991).

B. Petitioner's Interrogation Did Not Violate Respondent's Fourteenth Amendment Due Process Rights

1. The court of appeals based its decision in this case on its prior en banc holding in *Cooper* v. *Dupnik*, *supra* (see Pet. App. 10a-11a), that individuals have a right as a "matter of substantive due process" (963 F.2d at 1244) not to be subject to coercive questioning irrespective of whether resulting statements are used against them. *Cooper* based that conclusion on a misreading of a line of cases in which this Court held that statements taken involuntarily from a suspect are inadmissible at trial. See *ibid.* (citing *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936)). Beginning with *Brown* and continuing "in some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*, 378 U.S. 478 [(1964)]" this Court "refined the [voluntariness] test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson* v. *United States*, 530 U.S. 428, 434 (2000) (internal quotation marks omitted). However, far from supporting the court of appeals' conclusion, those cases recognize a *procedural* due process right to fair fact-finding *at trial*, and explicitly rejected the suggestion that defendants have a substantive right not to be questioned.

Brown involved confessions coerced by means of physical torture: Suspects were beaten and told that the abuse would continue until they confessed to a murder. The Court squarely framed the issue to be the fairness of the trial, rather than the means by which the confessions were obtained: "The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted * * * by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment." 297 U.S. at 279. The Court noted that the freedom of the state "to regulate the procedure of its courts in accordance with its own conceptions of policy" was limited

by the constraints of fundamental fairness (*id.* at 285 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)), concluding that "*the use of the confessions thus obtained as the basis for conviction* * * * was a clear denial of due process." 297 U.S. at 286 (emphasis added). Likening the case to the knowing use of perjured testimony to "contrive a conviction through the pretense of a trial" (*ibid.*), the Court reasoned "the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." *Ibid.*

While the voluntariness rule began as a protection against unreliable evidence, it expanded to exclude involuntary confessions regardless of their reliability. But throughout, the Court has maintained that "[t]he aim of the requirement of due process is * * * to prevent fundamental unfairness *in the use of evidence*." *Lisenba* v. *California*, 314 U.S. 219, 236 (1941) (emphasis added); accord, *e.g.*, *Malinski* v. *New York*, 324 U.S. 401, 404 (1945) (framing question as "whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession"); *Haynes* v. *Washington*, 373 U.S. 503, 516 (1963) (inquiry involves "determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process"); *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964) ("the Fourteenth Amendment forbids the use of involuntary confessions"); *Mincey* v. *Arizona*, 437 U.S. 385, 402 (1978) (due process "requires that statements obtained [involuntarily] cannot be used in any way against a defendant at his trial"). Indeed, the Court has characterized the defendant's interest as a "right to be *free of a conviction* based upon a coerced confession." *Jackson* v. *Denno*, 378 U.S. at 377 (emphasis added).

Although the Court has rightly condemned the use of brutality to extort confessions, it has clearly indicated that

the use of such tactics is relevant to the voluntariness inquiry only because it affects the admissibility of resulting statements. In *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), police had coerced a confession from a suspect and obtained a second confession several hours later. While "improper methods were used to obtain [the first] confession," the Court noted that "that confession was not used at the trial." *Id.* at 602. Because the Court concluded the second confession was voluntary, it held that its introduction at trial was not a violation of due process. *Id.* at 604-605. The Court explicitly rejected the notion that the voluntariness test restricted the primary conduct of law enforcement: "A coerced confession is offensive to basic standards of justice, *not because the victim has a legal grievance against the police*, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Id.* at 605 (emphasis added). Cf. *Lisenba*, 314 U.S. at 235 ("[P]etitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness in the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue."); *Stroble* v. *California*, 343 U.S. 181, 197 (1952) ("[w]hen this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial").[8]

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[8] Although there is some language in *Miller* v. *Fenton*, 474 U.S. 104 (1985), suggesting that use of coercion itself violates the Constitution, see *id.* at 117 (discusses determination whether "the confession was obtained in a manner consistent with the Constitution"), taken in the context of other language in the opinion, see *id.* at 116 (noting that due process right "assures that *a conviction will not be secured* by inquisitorial means") (emphasis added), that decision does not depart from this Court's consistent rule that the voluntariness inquiry "test[s] admissibility." *Ibid.*

2. Nor can respondent make out any claim of a substantive due process "right[] to be free from police coercion." Pet. App. 11a. The analysis of any claim to a substantive due process right should begin with "a 'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997); *Reno* v. *Flores*, 507 U.S. 292, 302 (1993). Because of the expansive meaning of the word "coercive" (Pet. App. 11a), coercive behavior might include such relatively mild conduct as persistent questioning in the face of a request to stop. However, there is no legal basis for establishing such a broad substantive due process "right to silence." *Cooper*, 963 F.2d at 1248. This Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. * * * We must therefore exercise the utmost care whenever we are asked to break new ground in this field." *Glucksberg*, 521 U.S. at 720 (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992)). It would be difficult to assert that a right not to be subject to police questioning is so "deeply rooted in this Nation's history and tradition" to be considered "fundamental." *Glucksberg*, 521 U.S. at 720-721. As this Court has recognized, "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 232 (1973) (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966)). Indeed, "[u]nless his silence is protected by the privilege against self-incrimination, the criminal defendant no less than any other citizen is obliged to assist the authorities." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980). There is therefore no basis for creating any constitutional right to be free of unwanted police questioning.

This is not to say that the Constitution does not impose limits on police misconduct. However, the Fourteenth

Amendment only prohibits police practices that are "so brutal and so offensive to human dignity" (*Rochin* v. *California*, 342 U.S. 165, 174 (1952)) that they "shock[] the conscience." *Id.* at 172 (entering house without warrant, forcing open mouth and use of stomach pump to extract illicit narcotics). Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 436-437 (1957) (distinguishing *Rochin*; taking blood sample from unconscious defendant does not "shock[] the conscience"). It does not convert every inadmissible confession into a constitutional tort remediable with money damages. This Court has "repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Lewis*, 523 U.S. at 846. Thus, "conduct intended to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849 (emphasis added); cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 (1982) (in determining whether substantive due process right has been violated, "it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society' ").

Petitioner's conduct falls far short of that standard. Far from being "unjustifiable," it was entirely proper for petitioner to attempt to preserve the statement of the victim of a police shooting. See C.A. App. 439, 452. Cf. *United States* v. *Caldera*, 421 F.2d 152, 153 (9th Cir. 1970) (per curiam) (force used to prevent suspect from swallowing evidence was not so "shocking or unreasonable" to constitute due process violation); *United States* v. *Harrison*, 432 F.2d 1328, 1330 (D.C. Cir. 1970) (holding that police officer's grabbing of throat to prevent swallowing of heroin capsules was not shocking to the conscience because done "to prevent the destruction of evidence"). See generally *New York* v. *Quarles*, 467 U.S. at 657-658 (discussing need for questioning to secure public safety). In view of the important purpose of his questioning, and petitioner's mild restriction on respondent's

liberty interest—essentially, persistence in questioning a witness suffering from grave preexisting injuries despite his not wish to talk—"the challenged conduct falls short of the kind of misbehavior that * * * shocks the sensibilities of civilized society." *Moran* v. *Burbine*, 475 U.S. 412, 433-434 (1986) (failure to inform suspect during interrogation that lawyer had been engaged to represent him and wished to be present for questioning, and police misstatement to lawyer that suspect would not be questioned until next day, did not violate substantive due process).

Although respondent alleged that petitioner "with deliberate indifference interfered with the medical assistance to [him]" (Amended Compl. ¶ 13), the record is devoid of testimony or evidence from any medical personnel that petitioner's presence interfered with treatment, and there was considerable evidence that medical personnel continued to treat him. *E.g.*, C.A. App. 16-18, 90, 115, 271, 272. Indeed, the district court noted "there is insufficient evidence to establish that Chavez's actions interfered with plaintiff's treatment." Pet. App. 24a. Even taking the complaint at face value, the complaint's allegation that petitioner acted with "deliberate indifference" (Amended Compl. ¶¶ 13, 17) states a level of intent insufficient to support a constitutional violation in emergency situations of the sort at issue here. In *County of Sacramento* v. *Lewis*, *supra*, this Court held that allegations of "deliberate indifference" were insufficient to support a claim that police had violated the substantive due process rights of a suspect by engaging in a high-speed chase that resulted in the death of a passenger. 523 U.S. at 851-853. The same rule is required here. Petitioner was questioning the key witness to a police shooting, who he thought would soon die. If petitioner did not act quickly, the evidence likely would be lost. There can be no serious question that petitioner was required to act "in haste, under pressure, and * * * without the luxury of a second chance."

Id. at 853 (internal quotation marks omitted). Accordingly, respondent must make a showing that petitioner had "a purpose to cause harm." *Id.* at 854.

C. The Court Of Appeals' Rule Will Significantly Disrupt Legitimate Law Enforcement Efforts

The court of appeals' novel holding that the taking of an involuntary statement constitutes a completed Fifth and Fourteenth Amendment violation—without regard to whether it will be used in a criminal trial, or whether the circumstances of its taking are sufficiently severe to "shock the conscience"—will chill legitimate law enforcement efforts to obtain potentially life-saving information during emergencies. The *Miranda* exclusionary rule and restrictions on the use of involuntary confessions (*e.g. Mincey* v. *Arizona*, 437 U.S. at 398 (involuntary statements may not be used for any purpose at criminal trial)), already provide a strong deterrent against the taking of compelled statements, and the principles of *Rochin* and *Lewis* already prohibit egregious misconduct. Accordingly, the principal effect of the court of appeals' rule will be to limit the use of methods that do not "shock the conscience" to gather information in situations where interests in collecting evidence for criminal prosecutions are subsidiary to some other concern—for example, when there is an imminent threat of harm. While there is a limited exception to the *Miranda* rule for cases implicating public safety, see *New York* v. *Quarles*, 467 U.S. at 655-658, the court of appeals made no reference to *Quarles* nor any comparable accommodation for the demands of public safety, and did not address petitioner's claim that exigent circumstances required him to preserve respondent's testimony. By equating standards developed for "[]fairness in the use of evidence" (*Lisenba*, 314 U.S. at 236) with minimum standards for official conduct regardless of the use to which the statements are put, the court creates a serious risk of chilling the responsiveness of law enforcement when

it matters most—in the face of an immediate threat to public safety. The consequence of misjudging whether police conduct subsequently will be held to be within the public safety exception to *Miranda* and not unduly coercive is now personal liability, not just the exclusion of evidence at trial. That critical difference cannot help but chill law enforcement officers in the field.

Maintaining the distinction between police conduct that renders a statement inadmissible and police conduct that independently violates the Constitution provides necessary breathing space that furthers both the need for law enforcement to confront imminent threats and the civil liberties of those who stand trial for a criminal offense. The use of a statement in a criminal trial implicates constitutional interests distinct from those implicated by the process of obtaining the statement in the first place. Ignoring that critical difference, as the court of appeals did, necessarily means that some beneficial law enforcement efforts will be needlessly chilled or that some statements will improperly be entered into evidence. Society could not function if rules of admissibility set the outer limits on permissible police conduct; nor should minimum standards for police conduct govern admissibility in a criminal case. This case illustrates the critical difference between procuring statements and procuring statements *for use at trial*. Respondent's dire condition was the result of a police shooting, and respondent obviously is the key non-police witness to the episode. Obtaining the witness' statement over his objection for subsequent use against him in a criminal trial implicates far different constitutional interests than obtaining that same statement to preserve eyewitness testimony of potential police misconduct (or in a different case to procure a description of a dangerous suspect still at large).

As Justice Marshall wrote:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* v. *Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

New York v. *Quarles*, 467 U.S. at 686 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting); cf. *id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("*Miranda* has never been read to prohibit the police from asking questions to secure the public safety," but only addresses admissibility of statements taken without warnings). This Court should "decline to place officers * * * in the untenable position of having to consider, often in a matter of seconds" (*New York* v. *Quarles*, 467 U.S. at 657-658), whether to risk not just hampering a prosecution but incurring personal liability in order to "neutralize the volatile situation confronting them." *Ibid.*

D. Even If Petitioner Violated Respondent's Constitutional Rights, Those Rights Were Not "Clearly Established" At The Time He Was Questioned

Even if this Court were to recognize for the first time a right to be free of coercive police questioning, petitioner

would be entitled to qualified immunity because the right was not "clearly established" at the time of his conduct. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2515 (2002) (internal quotation marks omitted). If government officials "of reasonable competence" could disagree on whether the action is illegal, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Given the sparsity of authority suggesting that coercive police questioning violates the Fifth and Fourteenth Amendments in the absence of police brutality or use of resulting statements in a criminal case, and the abundant authority to the contrary, petitioner is clearly entitled to qualified immunity.

1. There Is No Clearly Established Fifth Amendment Right To Be Free Of Coercive Police Questioning

Any claim that a reasonable officer would have known that coercive questioning alone would violate the Fifth Amendment is difficult to square with statements by this Court that are directly to the contrary. This Court has quite explicitly stated that while "conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Verdugo-Urquidez*, 494 U.S. at 264. Although that statement may be, as the court of appeals concluded (Pet. App. 10a n.3), "dicta," it reflects fundamental principles underlying much of this Court's Fifth Amendment doctrine. See pp. 8-15, *supra*. Moreover, laypersons in law enforcement should not be held personally liable for failing to distinguish *obiter dictum* from *ratio decidendi* when they are making necessarily hurried decisions in the field. Such an unequivocal statement from a controlling court must at a minimum introduce sufficient doubt about the correct state of the law to warrant immunity, especially because the Ninth Circuit ordinarily

"give[s] great weight to Supreme Court dicta." *Gubiensio-Ortiz* v. *Kanahele*, 857 F.2d 1245, 1259 n.10 (9th Cir. 1988).[9]

Significantly, every other court of appeals to have addressed the question has held that coercive questioning does not violate the Fifth Amendment unless resulting statements are used in a criminal case. See, *e.g.*, *DeShawn E.*, 156 F.3d at 346 ("there can be no Fifth Amendment violation until th[e] [compelled] statement is introduced against the defendant in a criminal proceeding"); *United States* v. *Gecas*, 120 F.3d 1419, 1432 (11th Cir. 1997) (Fifth Amendment protects against "the use of the testimony, not its compulsion"), cert. denied, 524 U.S. 951 (1998); *Riley* v. *Dorton*, 115 F.3d 1159, 1165 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992); *Davis* v. *City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987). Still others have held that no Fifth Amendment right against compelled questioning was "clearly established," even after *Cooper* v. *Dupnik*. See *Wiley*, 14 F.3d at 996 (Powell, J.); *Giuffre* v. *Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994) (noting "[t]he majority in *Cooper* broke new ground" in holding the Fifth Amendment was violated "even though [compelled] statements were never used"). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

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[9] Compare, *e.g.*, *United States* v. *Marlow*, 278 F.3d 581, 588 n.7 (6th Cir.) ("[a]ppellate courts have noted that they are obligated to follow Supreme Court *dicta*") (collecting authorities), cert. denied, 122 S. Ct. 2342 (2002); *Harbury* v. *Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (considering itself bound by "firm and considered" *Verdugo-Urquidez* dicta regarding Fifth Amendment), rev'd on other grounds, 122 S. Ct. 2179 (2002).

2. There Is No Clearly Established Fourteenth Amendment Right To Be Free Of Coercive Police Questioning Under The Circumstances Of This Case

There is likewise no basis for concluding that petitioner's conduct violated a "clearly established" due process right. To begin with, this Court has never held (absent physical brutality) that coercion alone violates the Fourteenth Amendment: In cases from *Brown* v. *Mississippi* through *Mincey* v. *Arizona*, the Court has held it is the *admission into evidence* of such statements that violates the Constitution, and has rejected the notion that the conduct in obtaining statements itself violates procedural due process. *Lyons* v. *Oklahoma*, 322 U.S. at 605. While a handful of court of appeals decisions suggest that taking an involuntary confession itself violates due process, see *Cooper* v. *Dupnik*, *supra*; *Rex* v. *Teeples*, 753 F.2d 840, 843 (10th Cir.), cert. denied, 474 U.S. 967 (1985), those decisions are in tension with *Lyons* and with other court of appeals cases holding that, absent use of the statement, such claims are analyzed under the much more exacting "shocks the conscience" test of substantive due process. *E.g.*, *Wilkins* v. *May*, 872 F.2d 190, 195 (7th Cir. 1989) (although characterizing right as "procedural," holding it would not be violated absent misconduct that "shock[s] the conscience"), cert. denied, 493 U.S. 1026 (1990); see also *DeShawn E.*, 156 F.3d at 348 (challenged conduct must "be the 'kind of misbehavior that * * * shocks the sensibilities of civilized society'").

Petitioner's conduct did not approach the brutality that would have put a reasonable officer in November 1997 on notice that his conduct clearly violated respondent's substantive due process rights. There is no allegation that petitioner so much as touched respondent, nor is there evidence that petitioner caused harm to respondent by interfering with his medical treatment. Rather, petitioner questioned respondent for approximately ten minutes over a

period of 45 minutes in the face of requests to stop the interview until he had been treated for critical, painful injuries. Courts had found far more outrageous conduct not to violate substantive due process. See *Hopson* v. *Fredericksen*, 961 F.2d 1374, 1379 (8th Cir. 1992) (officer's utterance of a racial slur and threat to "'knock [the suspect's] remaining teeth out of his mouth' if he remained silent" failed "to rise to the level of a 'brutal and wanton act of cruelty'" sufficient to support substantive due process claim under Section 1983); *Wilkins* v. *May*, 872 F.2d at 195. See generally *United States* v. *Kelly*, 707 F.2d 1460, 1476 n.13 (D.C. Cir.) (Ginsburg, J.) (noting courts have found substantive due process violations only in a "slim category of cases in which the police have been brutal, employing against the defendant physical or psychological coercion that 'shocks the conscience'"), cert. denied, 464 U.S. 908 (1983).

Moreover, a reasonable officer would have had every reason to believe that courts would take into consideration efforts to preserve the testimony of a key witness thought to be nearing death. Courts (including the Ninth Circuit) had considered a police officer's effort to preserve evidence in mitigation of claims that conduct was so outrageous as to violate substantive due process. See, *e.g.*, *Caldera*, 421 F.2d at 153; *United States* v. *Peterson*, 455 F.2d 519, 519 (9th Cir. 1972) (per curiam); *Harrison*, 432 F.2d at 1330 (use of force "to prevent the destruction of evidence in the course of the execution of a valid warrant" did not shock the conscience). Other courts had considered different types of exigencies in determining whether conduct was so outrageous as to violate substantive due process. *E.g.*, *Boveri* v. *Town of Saugus*, 113 F.3d 4, 6-7 (1st Cir. 1997) (considering emergency nature of situation in determining whether police conduct violated substantive due process); *Rucker* v. *Har-*

ford County, 946 F.2d 278, 282 (4th Cir. 1991) (same), cert. denied, 502 U.S. 1097 (1992).[10]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

SEPTEMBER 2002

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[10] Nor would even *Cooper* v. *Dupnik* have put a reasonable officer on notice that "his conduct was unlawful in the situation he confronted" here. *Saucier*, 533 U.S. at 202. *Cooper* explicitly indicated that it did not "establish a cause of action *where police officers continue to talk to a suspect after he asserts his rights* and where they do so in a benign way, without coercion or tactics that compel him to speak." 963 F.2d at 1244. *Cooper* offers little useful guidance for cases not so "laden with police misconduct" as it was. *Ibid.* There was no indication of exigent circumstances in *Cooper*; rather, the officers were carrying out a preconceived plan to extract a confession from the suspect so as to "mak[e] it difficult, if not impossible, for [him] to take the stand in his own defense." *Id.* at 1249. The suspect there was subjected to conduct far more severe than that involved here. Cf. *id.* at 1248 (suspect subjected to "hours of mistreatment and what can fairly be described as sophisticated psychological torture").

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No. 01-1444

In The
SUPREME COURT OF THE UNITED STATES

BEN CHAVEZ, Petitioner

v.

OLIVERIO MARTINEZ, Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF PETITIONER

Devallis Rutledge*
Manning & Marder, Kass, Ellrod, Ramirez, LLP
1 Park Plaza, Suite 225
Irvine, California 92614
(949) 440-6690; (949) 474-6991 (Fax)

William J. Johnson
National Association of Police Organizations, Inc.
750 First Street, N.E., Suite 920
Washington, D.C. 20002-4241
(202) 842-4420; (202) 842-4396 (Fax)

*Counsel of Record for *Amicus Curiae*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations is a non-profit organization, representing state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that serves to advance the interests of law enforcement officers through advocacy, education and legislation. NAPO represents 4,000 organizations, with more than 220,000 sworn law enforcement officers and 11,000 retired officers. Within the Ninth Circuit, NAPO represents through its members tens of thousands of officers in Alaska, Arizona, California, Montana, Nevada, Oregon and Washington, including petitioner.

The specter of undue civil liability can have adverse effects on investigative initiative, and on the ability of agencies to recruit and retain sufficient experienced officers to provide the levels of public safety society demands and deserves.

Therefore, the associations and officers represented by NAPO and its 501(c) affiliate, the National Law Enforcement Officers' Rights Center, have a direct and immediate interest in the resolution of any issue that simultaneously affects both the ability of law enforcement officers to investigate crimes, and their potential civil liability for doing so in particular ways. This case presents such an issue.*

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* No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief, and their respective letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit analysis of § 1983 claims for coercive police interrogation errs in interchanging Fifth and Fourteenth Amendment principles, and in assuming that practices which may make statements inadmissible in a criminal trial *ipso facto* violate the Constitution, so as to make interrogating officers civilly liable.

ARGUMENT

I. The Court of Appeals erred in analyzing respondent's § 1983 coercive interrogation claim under the Compulsory Self-incrimination Clause of the Fifth Amendment, rather than under the Fourteenth Amendment Due Process Clause.

In any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989). In taking this first step, the Court of Appeals stumbled.

This Court said, in *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that a person claiming to have been subjected to coercive police interrogation "may bring a federal cause of action under the Due Process Clause," citing *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989). The *Wilkins* court rejected the argument that coercive interrogation claims should be analyzed under the Fifth Amendment provision against compulsory self-incrimination, holding instead that they should be analyzed under the Due Process Clause of either the Fifth Amendment (for *Bivens* claims against federal officers) or Fourteenth Amendment (for § 1983 claims against state officers, as here). *Id.*, at 195.

Wilkins noted that the test for liability under the Due Process Clause involves "a high threshold," requiring a plaintiff to "show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience." *Ibid.* This is the same standard that

this Court has repeatedly reaffirmed as the proper test for civil liability under the Due Process Clause. *E.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846-49 (1998); *Whitley v. Albers*, 475 U.S. 312, 327 (1986). At the outset of its discussion, therefore, the Ninth Circuit Court of Appeals should have noted that Martinez was seeking recovery for allegedly coercive interrogation by Sgt. Chavez under **both** the Fifth and Fourteenth Amendments. This redundant statement of claims should have been rejected, and the Court of Appeals should have confined its analysis to the issue of whether the undisputed material facts stated a claim for conscience-shocking behavior in violation of Fourteenth Amendment substantive due process. This approach would have been consistent with this Court's suggestion in *Dickerson*, and with the holdings of *Lewis* and *Albers, etc.*

This approach also would have kept the Court of Appeals from erroneously straying into *Miranda* issues, which relate exclusively to the admissibility of a criminal defendant's extrajudicial statements at his criminal trial. *Beckwith v. United States*, 425 U.S. 341, 345 (1976) (the "narrow issue" decided by *Miranda* was "admissibility of statements"); *Dickerson v. United States, supra*, 530 U.S. at 432 (*Miranda* and its progeny "govern the admissibility of statements" in state and federal courts). Questionable conclusions about "custody" and "interrogation" need not have been reached. (The recited facts do not establish, for example, that Martinez was under arrest or corresponding police restraint at the hospital, or that Sgt. Chavez's questioning when Martinez was expected to die could have been for the purpose of eliciting statements with which to incriminate Martinez at a criminal trial.)

And a due process approach would have prevented the Ninth Circuit from continuing its solitary departure from the overwhelming consensus of the remaining circuits on this issue. The opinion below completes a trilogy of opinions in which the Ninth Circuit has held that interrogation conducted

without compliance with *Miranda*'s admissibility prerequisites of warning and waiver may be actionable under § 1983 as violative of the Fifth Amendment privilege that *Miranda* was designed to protect. *See also, Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000).

In contrast with the Ninth Circuit, the consensus of the other federal circuits is that police deviation from *Miranda* procedures does not state a claim under the Fifth Amendment *per se*, and that actual constitutional violations of the privilege against compelled self-incrimination occur only with the wrongful introduction of a defendant's statement *at his trial*. *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *Neighbor v. Covert*, 68 F.3d 1508, 1510 (2nd Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994); *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997); *Hutsell v. Sayre*, 5 F.3d 996, 1005, n.13 (6th Cir. 1993); *Hensley v. Carey*, 818 F.2d 646, 650 (7th Cir. 1987); *Davis v. City of Charleston, Missouri*, 827 F.2d 317, 322 (8th Cir. 1987); and *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

This Court, too, has made clear that while the Fifth Amendment privilege is available to be *claimed* in a variety of settings—including custodial police interrogation—an actual constitutional violation occurs only when a compelled statement is admitted to prove guilt at trial. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *United States v. Balsys*, 524 U.S. 666, 692 (1998) (rejecting the notion that the Fifth Amendment provides a "protection of personal inviolability" that prohibits involuntary interrogation, without regard to whether testimonial responses could or would be used in a criminal prosecution).

In this case, however, the Court of Appeals described this Court's statement in *Verdugo-Urquidez* as unpersuasive "dicta," and failed to acknowledge *Balsys* and other cases in

which this Court has repeatedly taught that the Fifth Amendment is not violated by the *compulsion* of statements, but by their *use* in a criminal prosecution. *Lefkowitz v. Turley*, 414 U.S. 70, 78, 84 (1973); *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *Garner v. Broderick*, 392 U.S. 273, 276 (1968).

Unlike violations of the Fifth Amendment protection against compelling an accused to be a witness against himself—which are trial errors—violations of the due process clauses may occur either pretrial or during trial. *Substantive* due process protects suspects against interrogation techniques that shock the conscience. Such interrogation *is* actionable under § 1983, because the constitutional violation "is complete when the wrongful action is taken." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

On the other hand, *procedural* due process protects against the use of coerced confessions at trial, even though the degree of coercion may not have been sufficient to shock the conscience, but still enough to render the resulting confession involuntary.

Wrongful introduction of such an involuntary confession, however, cannot form the basis for § 1983 liability against officers, for this procedural mistake is a "trial error, similar ... to the erroneous admission of other types of evidence." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Police officers, of course, cannot be held liable for mistakes made by trial judges in the admission of evidence. *Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir. 1972) (police not liable where judge admits involuntary confession).

This framework for analyzing civil claims of coercive interrogation works: it recognizes that such claims do not lie under the self-incrimination clause of the Fifth Amendment—which protects a "fundamental trial right." *Withrow v. Williams*, 507 U.S. 680, 691 (1993). (Citation

omitted.)

It also recognizes that police are not civilly liable where non-shocking promises of leniency or other improper coercion results in an involuntary statement, though procedural due process would require exclusion of the statement from trial. "[A]ny criminal *trial use*" of an involuntary confession "is a denial of due process." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). (Emphasis deleted and added.)

And, this approach allows for civil redress where the facts indicate that interrogators employed such outrageous coercion as to shock the conscience. *Wilkins v. May, supra. Bivens* claims would thus be analyzed under the Fifth Amendment due process clause, and § 1983 claims under the Fourteenth Amendment due process clause (though the standard would be the same).

Because the Court of Appeals did not follow this analytical framework, and because this framework is the only one that is fully consistent with this Court's teachings as to the nature of these various constitutional protections, the decision below should be reversed.

II. The Court of Appeals inappropriately relied on evidentiary principles to define the standard for civil liability.

As it did in *California Attorneys for Criminal Justice v. Butts, supra,* and *Cooper v. Dupnik, supra*, the Court of Appeals again resorted to *admissibility* decisions to support its conclusion that Sgt. Chavez violated Martinez's constitutional rights in the hospital. This is unsound analysis, for just because some provision of the Constitution may dictate that certain evidence be excluded from a criminal trial does *not* necessarily mean that police violated the Constitution in the method of procuring the evidence.

For example, a non-testifying coconspirator's confession implicating a non-confessing codefendant is

generally inadmissible at their joint trial, because of the Sixth Amendment right to confront adverse witnesses. *Bruton v. United States*, 391 U.S. 123 (1968). But that does not imply that the interrogating officer violated the Sixth Amendment by taking the inadmissible statement.

Likewise, a suggestive pretrial identification might be inadmissible at trial because of the Fifth or Fourteenth Amendment Due Process Clauses. *Stovall v. Denno*, 388 U.S. 293 (1967). But that admissibility rule does not mean that the officer violated the Constitution in obtaining the inadmissible identification evidence. *See, e.g., Hutsell v. Sayre, supra*, 5 F.3d at 1005 (no police liability for conducting identification procedure that resulted in inadmissible pretrial identification evidence).

The Court of Appeals had before it a claim that a police officer's conduct *itself* violated the Constitution—not that any resulting evidence might have been constitutionally inadmissible at any eventual criminal trial. But instead of analyzing the issue of whether the officer's conduct *itself* violated the Constitution by reference to decisions of this Court which define the test for such analysis, the Court of Appeals relied on decisions concerning the *admissibility* of involuntary statements. The Court of Appeals incorrectly read those decisions as having found the *questioning* unconstitutional, when in fact, this Court clearly said in each of the cited cases that it was the *evidentiary use* of the resulting confessions *in a criminal trial* that offended constitutional protections.

For example, in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), the Court said that "the *use* of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Ashcroft v. Tennessee*, 322 U.S. 143, 155 (1944) spoke of the constitutional bar "against the *conviction* of any individual *in an American court* by means of a coerced confession." *Haynes v. Washington,* 373 U.S. 503, 515 (1963), held that due process had been violated "by

admission in evidence of a coerced confession...." In *Lynumn v. Illinois*, 372 U.S. 528, 529 (1963), the Court's holding could not have been clearer: "[W]e hold that the petitioner's *trial* did not meet the demands of due process of law." And *Mincey v. Arizona*, *supra*, 437 U.S. at 398, noted that "any criminal *trial use* against a defendant of his involuntary confession is a denial of due process of law." (All emphases added; emphasis deleted in *Mincey*.)

Not one of the cases cited by the Court of Appeals declared that a *police officer* had violated the Constitution in coercing the various involuntary confessions. It was enough to offend procedural due process that the statements were coerced, and so inadmissible. The **separate** issue of whether the interrogation techniques that produced these involuntary confessions were not just coercive but shocking to the conscience, so as to work an accomplished violation of substantive due process by the police officers, was not addressed.

The test for *inadmissibility* under *procedural* due process is not identical with the test of *impermissibility* under *substantive* due process. If it were, then every threat or promise that was sufficiently coercive as to render a statement inadmissibly involuntary would imply a constitutional violation by the interrogator, without regard to the conscience-shocking standard set by this Court, and applied in *Wilkins*, which the Court approvingly cited. In *Arizona v. Fulminante*, *supra*, 499 U.S. at 287, for example, the Court found a credible threat by a fellow inmate (who was a police agent) sufficiently coercive as to render a resulting statement involuntary. But this would be no warrant for finding any police officer liable for a conscience-shocking tactic that violated Fulminante's constitutional rights.

In analyzing Martinez's claim of a constitutional violation by Sgt. Chavez, the Court of Appeals completely ignored the critical distinction between what it takes to make

a confession inadmissible, and what it takes to make an interrogating officer civilly liable for substantively violating the Constitution with behavior so outrageous as to shock the conscience. This analytical error brought the Court of Appeals to a conclusion that cannot be sustained on the facts recited.

This Court should clarify that its statement in *Verdugo-Urquidez*, whether dicta or not, correctly describes the nature of the Fifth Amendment privilege against compelled *testimonial* self-incrimination at trial, and that police officers do not violate this clause of the Fifth Amendment during interrogation.

The Court should instruct the inferior courts that coercive interrogation civil claims should be analyzed as *Wilkins* described, under the *Due Process Clause* of the Fifth Amendment (*Bivens* claims against federal officers) or Fourteenth Amendment (§ 1983 claims against state officers).

Further, the Court should affirm that the proper standard for evaluating such claims is not found in admissibility decisions considering issues of voluntariness or *Miranda* compliance, but in the substantive due process cases, such as *County of Sacramento v. Lewis, supra*, and that the high threshold a plaintiff must meet is a showing of official conduct that shocks the conscience.

III. Measured against the proper standard, Sgt. Chavez's conduct was not unconstitutional.

The facts showed that Chavez attempted to obtain Martinez's version of a shooting that both men felt had inflicted fatal wounds. Chavez sought to question Martinez for a few minutes, in the hospital emergency room (not a police-dominated atmosphere rife with compulsion, but a place of rescue and lifesaving care). Martinez objected, telling Chavez, "I'm dying." When the medical personnel became insistent that Chavez desist and leave, he did so.

These brief efforts to obtain the victim's account of having been shot by a police officer before he succumbed to his wounds were hardly shocking to the conscience. Martinez was not in police custody, he had not requested the assistance of counsel, the questions were not "interrogation" (since neither man anticipated any potential incriminatory use in *this* world of any statements that might have been elicited), questioning was one-on-one, and each time Chavez was asked to stop, he did so. There were no threats or overbearing promises of leniency, and no force was used or care withheld.

In evaluating civil claims of excessive force in cases of fatal police shootings, the Ninth Circuit Court of Appeals has frequently lamented the fact that the decedent's story often goes untold, and there is only the police officer's word as to what happened. "Deadly force cases pose a particularly difficult problem under this regime because the officer-defendant is often the only surviving eyewitness." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). *Accord, Reynolds v. County of San Diego*, 84 F.3d 1162, 1169 (9th Cir. 1996), and *Billington v. Smith*, 292 F.3d 1177, 1181 (9th Cir. 2002).

When Sgt. Chavez tried to obtain Martinez's anticipated dying declaration about how the shooting had occurred, he was engaged in an effort that could have helped his department assess the reasonableness of the force used, and could incidentally have addressed the Ninth Circuit's expressed concerns about the lack of the decedent's description of the shooting. The questioning thus served legitimate government interests, and was not intended to injure Martinez in any way.

This Court has said that only "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento v. Lewis*, *supra*, 523 U.S. at 849. There is nothing in Chavez's motives or his methods that meets this "high threshold" of

conscience-shocking behavior so as to violate substantive due process. Under this standard of analysis, Chavez was entitled to qualified immunity. His motion for summary judgment as to the claim of unconstitutionally-coercive interrogation should have been granted.

CONCLUSION

Before the burgeoning prospect of civil liability for investigative questioning threatens to force law enforcement officers within the states and territories of the Ninth Circuit into becoming defensively reluctant to engage in any and all legitimate questioning of persons in the performance of their duties, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Devallis Rutledge, Esq.
Manning & Marder, Kass, Ellrod, Ramirez LLP
1 Park Plaza, Suite 225
Irvine, California 92614
(949) 440-6690; (949) 474-6991 (fax)
Counsel of Record for *Amicus Curiae*

William J. Johnson, Esq.
National Association of Police Organizations
750 First Street, N.E., Suite 920
Washington, D.C. 20002-4241
(202) 842-4420; (202) 842-4396 (fax)
Amicus Curiae

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IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1) Is a police officer liable for damages in a civil action under 42 U. S. C. § 1983 for taking a statement from a suspect in a manner considered "compelled" for the Fifth Amendment's self-incrimination privilege?

2) Is a police officer liable in such an action for taking a statement without complying with the prophylactic rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966)?

3) Is a police officer liable in such an action for taking a statement in a manner that would render it inadmissible in a criminal trial under the procedural due process line of cases?

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IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt - and swift execution of punishment.

Interrogating suspects is an integral part of criminal investigation. A proper interrogation regime is essential to a system that seeks to punish the guilty, protect the innocent, and preserve the rights of all. Creating an elaborate system of civil

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

liability for interrogation that is contrary to the rules of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) or the subjective, difficult to define due process voluntariness standard is regulatory overkill. It would needlessly deter police from interrogating suspects, resulting in lost voluntary confessions and the unwarranted compensation of those who have suffered no real harm. This is contrary to the interests of justice and society that the CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On November 28, 1987, the plaintiff, Oliverio Martinez, was stopped and frisked by police officers Maria Peña and Andrew Salinas as the officers were investigating drug activity in Oxnard, California. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 854 (CA9 2001). Officer Salinas found a knife in Martinez's waistband during the frisk, and a struggle ensued. At one point during the struggle, Officer Salinas cried out " 'He's got my gun.' " *Ibid.* Officer Peña drew her weapon and fired on Martinez several times, severely injuring him. See *ibid.*

The patrol supervisor, Sergeant Ben Chavez, soon arrived at the scene. He rode in the ambulance with Martinez in order to get his version of what happened. See *ibid.* At the hospital, Sergeant Chavez started a taped interview with Martinez as emergency room personnel began treatment. See *ibid.* The interview lasted over 45 minutes, but the transcript of the recorded conversations totaled approximately 10 minutes. See *id.*, at 854-855. Medical staff asked Sergeant Chavez to leave the trauma room several times, but he returned and continued questioning. See *id.*, at 854. Most of Martinez's responses to the questioning were complaints about his physical condition, such as his pain or his inability to move his legs, or repeated requests for treatment. See *id.*, at 855. Martinez twice stated that he did not want to talk anymore. See *ibid.* During the interview, he "drifted in and out of consciousness." See *ibid.*

"Martinez's statements were not used against him in a criminal proceeding," *id.*, at 857, because he "was not charged with a crime as a result of the incident." See District Court Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication, Part III (Aug. 1, 2000), App. to Pet. for Cert. 16a.

Martinez filed suit under 42 U. S. C. § 1983, alleging that the defendants violated his constitutional rights "by stopping him without probable cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care." *Martinez*, 270 F. 3d, at 855. The District Court denied Sergeant Chavez's qualified immunity defense and "granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment." *Ibid.* (footnote omitted). Chavez brought an interlocutory appeal, claiming that he was entitled to qualified immunity. *Ibid.* The Ninth Circuit denied the appeal, holding that the questioning violated Martinez's Fifth Amendment rights, "[e]ven though Martinez's statements were not used against him in a criminal proceeding . . . ." *Id.*, at 857. The Ninth Circuit also held that the interrogation violated the due process proscription against coerced confessions, and that for this right the " 'violation is complete with the coercive behavior itself . . . .' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1244-1245 (CA9 1992) (en banc)). It concluded that "[i]n light of the extreme circumstances of this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments," and it affirmed the District Court decision to deny qualified immunity. See *id.*, at 859.

SUMMARY OF ARGUMENT

The Fifth Amendment self-incrimination privilege does not support a civil rights action. By its own terms it is an exclusionary rule that is only violated by the admission of compelled incriminating testimony. Because the violation is not complete until self-incriminating statements are improperly admitted, the Fifth Amendment cannot be violated during interrogation. As the immunity cases demonstrate, the Fifth Amendment does not create a right to be free from questioning under compulsion, but only a right to be free from compelled self-incrimination.

The policy behind the privilege is stated in the Fifth Amendment, keeping the government from forcing individuals to furnish evidence that can prove their guilt. This is satisfied by its exclusionary rule. Other policies, such as privacy, evidentiary reliability, and the accusatorial nature of our system do not justify expanding the privilege to include a civil remedy. The exclusionary rule is not just a remedy here, it is an integral part of the Fifth Amendment. Welding a civil cause of action onto the privilege will needlessly deter proper police interrogation of suspects.

The *Miranda* rule does not change the analysis. *Miranda* created an irrebuttable presumption; confessions taken contrary to its procedures are deemed compelled without regard to whether they were in fact compelled. This rule did not create any new remedies, but is a rule of evidence given constitutional force through the Fifth Amendment. Like the Fifth Amendment it serves, a *Miranda* violation is incomplete without the improper admission of a confession taken contrary to its rules. Therefore interrogation contrary to *Miranda* without improper incrimination rules does not violate the Constitution and thus cannot support civil liability. Any doubts that *Miranda* cannot be violated during interrogation is dispelled by the numerous exceptions to the rule. Because the *Miranda* rule excludes both compelled and voluntary confessions, adding a civil remedy

will needlessly compound the already high cost of *Miranda* in lost voluntary confessions.

The fact that this Court recently clarified that *Miranda* is a constitutional rule changes nothing. *Dickerson* v. *United States* kept the status quo by leaving *Miranda* and its exceptions intact. Because the exclusionary rule is inseparable from *Miranda*, *Miranda* cannot support a civil rights action.

While due process can support a civil rights action for improper interrogation, the due process voluntariness standard is not a source of civil liability. The cases prohibiting involuntary or coerced confessions deal with the exclusion of evidence and fundamental fairness, concepts associated with procedural due process. The process due is no more than a trial free from an involuntary confession. Like the Fifth Amendment, this procedural due process right is only violated by the admission of an involuntary confession. Therefore, it does not support a civil rights action.

There are also strong practical reasons for avoiding civil liability. The voluntariness standard has proven notoriously difficult to implement. Overbearing the will is not easily defined, and the test is necessarily subjective. As the inducement cases demonstrate, a confession can be deemed involuntary with little real coercive interrogation. Civil liability should not be based on such a weak standard.

Substantive due process provides the standard for assessing civil liability for interrogation. Unlike procedural due process, the substantive due process violation is complete with the improper interrogation. Under this standard, civil liability should be limited to interrogation involving force, the deprivation of food, water, or sleep, or threats of force or deprivation. Such techniques are never proper, and can be said to "shock the conscience" of the court. They are also objective and easily defined. This distinction between violent interrogation and merely involuntary confessions has received some implicit recognition from this Court. It is now time for explicit approval

by dismissing civil liability for the comparatively benign interrogation in this case.

ARGUMENT

This case is about the relationship between rights and remedies. While it is an old maxim that rights must have remedies, see, *e.g.*, *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 163 (1803), this does not "establish that the individual's protection must come in the form of a particular remedy." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 755, n. 37 (1982). In the Fifth Amendment's self-incrimination privilege, the remedy, excluding incriminating statements, is part of the right. Because a Fifth Amendment violation is not completed until incriminating statements are improperly admitted, exclusion is the sole remedy. The procedural due process right against the use of involuntary confession operates in the same way. Civil remedies for interrogation are limited to violations of substantive due process. This involves extreme behavior like torture, threats of violence, or the deprivation of food, water, or sleep. Because substantive due process was not violated in this case, there is no civil remedy for the interrogation.

I. The Fifth Amendment's self-incrimination privilege is only a right to have evidence excluded, and therefore does not support a civil rights action.

A. An Exclusionary Rule.

The Ninth Circuit's Fifth Amendment holding centers on the theory that a Fifth Amendment violation occurs at the moment of "compulsion" at the police station. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 856-857 (CA9 2001). This premise is fundamentally erroneous.

The Fifth Amendment's self-incrimination privilege is not a right to be free from compulsion, but rather from compelled

self-incrimination. The Fifth Amendment privilege is essentially an exclusionary rule. Although the legislative history of the Fifth Amendment adds little to our understanding of the privilege, see *United States* v. *Balsys*, 524 U. S. 666, 674, n. 5 (1998), the text demonstrates that the self-incrimination privilege centers on the use of evidence in the criminal trial. "No person . . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5. The privilege applies to attempts to compel in proceedings other than the criminal trial, see *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), but the scope of the privilege is still limited to actual incrimination. See *id.*, at 77.

Therefore, while compulsion is a necessary condition for a Fifth Amendment violation, it is not a sufficient condition for the self-incrimination privilege. If the threat of incrimination is eliminated, then the government can compel a witness to testify. See *Kastigar* v. *United States*, 406 U. S. 441, 448-449 (1972). Similarly, a prison disciplinary board may draw negative inferences from the prisoner's silence at the disciplinary hearing when that silence is not used in any criminal proceeding. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317-318 (1976). Where there is no threat of incrimination, the privilege is unnecessary.

The act of being interrogated can have adverse consequences other than self-incrimination, but this is irrelevant to the Fifth Amendment analysis. In *Brown* v. *Walker*, 161 U. S. 591 (1896), a grand jury witness invoked the privilege with regard to questions concerning crimes for which he could not be held liable. See *id.*, at 609. Justice Field's dissent contended, "The [Fifth] amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed may not lead to a criminal prosecution." *Id.*, at 631. This majority rejected that argument.

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him

of a criminal charge. If he secure himself legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good." *Id.*, at 605-606.

This is "black letter law . . . ." *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 273 (1983) (Blackmun, J., concurring in the judgment).

"[T]he privilege itself is *defined* in terms of the incriminating effect of truthful testimony . . . ." *United States* v. *Apfelbaum*, 445 U. S. 115, 134 (1980) (Blackmun, J., concurring in the judgment) (emphasis in original). It is only violated when evidence is improperly admitted at trial. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. [Citation.] Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial*." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) (emphasis added). Although dicta, the *Verdugo-Urquidez* statement is the correct rule of law.

The Fifth Amendment privilege "*is* an exclusionary rule—and a constitutionally created one." Dershowitz & Ely, *Harris* v. *New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198, 1214 (1971) (emphasis in original). Because the privilege is not violated until the improper admission of self-incriminating testimony, exclusion is the *only* proper means to enforce the Fifth Amendment. If there is no evidence to exclude or no criminal trial to exclude it from, then there is no violation of the privilege. In that event, there is nothing to "remedy." This differs from the Fourth Amendment's exclusionary rule. Fourth Amendment violations are complete before trial, at the time of the illegal search. See *Verdugo-Urquidez*, 494 U. S., at 264. The Fourth Amendment exclusionary rule is a judicially constructed remedy intended to deter police from violating that right. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984). Exclusion of evidence is not

a remedy for past violations of the Fifth Amendment privilege; it *is* the right itself.

In addition to comporting with constitutional text and this Court's precedents, denying civil liability for Fifth Amendment violations is the fairer approach. While police officers may produce an inadmissable statement through improper interrogation, the confession cannot be unconstitutionally admitted without the acquiescence of the trial judge and the prosecutor. These actors, with far more expertise in Fifth Amendment admissibility issues, are absolutely immune from civil liability for the improper admission of evidence at trial. See *Imbler* v. *Pachtman*, 424 U. S. 409, 427-428 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U. S. 547, 554-555 (1967) (judges). Police officers would be left holding the bag although the more responsible actors are immune. Cf. *Duncan* v. *Nelson*, 466 F. 2d 939, 942 (CA7 1972) (police officers who coerced the confession were not the proximate cause of its admission because they could not foresee that the judge would admit it).

B. Policy and the Privilege.

The Ninth Circuit's decision that the Fifth Amendment self-incrimination privilege can be violated even though the suspect was never incriminated relies on Fifth Amendment policy. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001). It followed Ninth Circuit precedent holding that one purpose of the Fifth Amendment "is to prevent coercive interrogation practices that are 'destructive of human dignity.' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1239 (CA9 1992) (en banc) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 457 (1966)). This is an unwarranted extension of *Miranda*. Like the Fifth Amendment it serves, *Miranda* is a trial right. It does not support a civil remedy because it is inseparable from the exclusion of evidence. See part II, *infra*. The Ninth Circuit's holding is also an improper application of extraneous policy to the self-incrimination privilege. The only policy behind the privilege is found in its text, preventing self-incrimination at

trial. While a source of other Fifth Amendment policies exists, it has been diminished, and does not justify expanding the Fifth Amendment.

An often quoted statement of policy justifications for the Fifth Amendment privilege is found in a famous passage from *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). That passage lists numerous policy justifications for the privilege, including rationales as diverse as a "sense of a fair play" and "respect for the inviolability of the human personality . . . ." See *id.*, at 55. This collection of policies does not justify expanding the Fifth Amendment beyond its exclusionary rule.

Murphy is a diminished precedent. Its examination of the historical treatment of the relationship between the threat of foreign prosecution and the self-incrimination privilege has been overruled. See *Balsys* v. *United States*, 524 U. S. 666, 687-688 (1999). *Balsys* also critically reexamined the *Murphy* policies. In *Balsys*, the Justice Department's Office of Special Investigations (OSI), "which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals," was investigating Balsys. See *id.*, at 670. The OSI asked Balsys about his wartime activities between 1940 and 1944, but he invoked the self-incrimination privilege, claiming a fear of prosecution in a foreign nation. *Id.*, at 669. This Court rejected that claim.

In addition to rejecting *Murphy*'s use of history to support Balsys' position, the *Balsys* Court also declined to rely on *Murphy*'s list of Fifth Amendment principles in order to expand the privilege. This Court established that "at its [the Fifth Amendment's] heart lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." *Id.*, at 683. The policies and aspirations listed in *Murphy* did not justify expanding the privilege beyond that principle:

> "we think there would be sound reasons to stop short of resting an expansion of the Clause's scope on the highly general statements of policy expressed in . . . . *Murphy*. While its list does indeed catalog aspirations furthered by the Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope." *Id.*, at 691.

Of particular importance is how this Court dealt with one of the broadest of the *Murphy* policies, "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." 378 U. S., at 55. If allowed to define the scope of the Fifth Amendment privilege, this principle "would necessarily seem to include protection against the Government's very intrusion through involuntary interrogation." *Balsys*, 524 U. S., at 691. Since " 'inviolability' is after all, an uncompromising term," then as with the Fourth Amendment, breaches would occur "at the moment of illicit intrusion, whatever use may or may not be made of their fruits." *Id.*, at 692. This Court refused to stretch the self-incrimination privilege beyond its traditional boundary. "The Fifth Amendment tradition, however, offers no such degree of protection." *Ibid.* The immunity cases demonstrated that the privilege allows testimony to be compelled so long as the compulsion is accompanied by an appropriate protection from incrimination. See *ibid.* Personal inviolability is simply inconsistent with Fifth Amendment practice and precedent. "Thus, what we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *Id.*, at 692-693 (footnote omitted). This conditional testimonial privacy is enforced through the exclusion of evidence, and not through civil liability. The Ninth Circuit's notion that the privilege can be violated without actual incrimination cannot be reconciled with *Balsys*.

Since many of the *Murphy* values are either too vague to be meaningful or restatements of the privilege, see Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1312 (1993), analyzing each of them is unnecessary. In addition to human dignity, two other values have been suggested as being central to the self-incrimination privilege—preserving evidentiary reliability and protecting the accusatorial nature of the system. See *ibid.* Neither supports expanding the Fifth Amendment beyond its exclusionary rule.

Evidentiary reliability is protected by the Fifth Amendment's exclusionary rule. The threat of civil liability adds nothing, particularly since the prosecutors that submit and the judges who admit the incriminating statements are immune from liability. See *supra*, at 9. Also, many police-initiated Fifth Amendment violations will not be unreliable. Police interrogation is subject to the Fifth Amendment through *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Miranda*'s presumption excludes both reliable and unreliable confessions, see *infra*, at 14, thus reducing the marginal benefit to reliability. Imposing civil liability for noncompliance with the *Miranda* procedures regardless of whether the confession obtained is reliable will add little or nothing to the reliability of evidence.

The accusatorial nature of our system does not change the fact that police interrogation is indispensable to it. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). Even more importantly, creating a civil remedy will not give any added protection to the accusatory system. The Fifth Amendment's exclusionary rule prevents the prosecution from taking any unfair advantage of a Fifth Amendment violation. Welding a civil remedy onto the Fifth Amendment serves no purpose other than to discourage interrogation.

It is important to place the cost of this over-deterrence in its proper context. A major consequence of the *Miranda* decision is a significant decrease in the frequency of confessions obtained by police. See, *e.g.*, Cassell & Hayman, Police

Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*, 43 UCLA L. Rev. 840, 917 (1996); Cassell, *Miranda*'s Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 416-418 (1996). Potential voluntary confessions were lost because police either scrupulously followed *Miranda* or even went beyond the *Miranda* requirements. See Cassell & Hayman, *supra*, at 920. Civil liability for Fifth Amendment violations compounds this cost by adding more over-deterrence to the system. *Miranda* already makes police stop short of the actual constitutional limit of permissible interrogation. Adding civil liability will move them even further away, allowing the guilty to go free, and innocent suspects to remain under suspicion. See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 680-681 (1968) ("A man in suspicious circumstance but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . .").

Balsys provides the best approach to defining the Fifth Amendment's scope. The privilege should remain grounded in its primary purpose, preventing the government from using compelled testimony to prove the suspect's guilt. A civil remedy adds nothing to this goal while harming society by unnecessarily deterring police interrogation of suspected criminals. As in *Balsys*, precedent, constitutional text, and practicality all argue against expanding the Fifth Amendment.

II. *Miranda*'s irrebuttable presumption does not support a civil remedy for Fifth Amendment violations.

Because the police are the only individuals likely to be held civilly liable for Fifth Amendment violations, see *supra*, at 9, *Miranda* v. *Arizona*, 384 U. S. 436 (1966) would be the source of any civil rights case for alleged Fifth Amendment violations. While that landmark decision dramatically expanded the Fifth Amendment's reach, it did not add any new remedies. *Miranda*

is a rule of evidence given constitutional force through the Fifth Amendment's self-incrimination privilege. The product of an interrogation that does not comport with *Miranda* and its permutations, see, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), is presumed to be involuntary without regard to whether it was in fact involuntary. *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985). This rule of evidence should only be implemented by an exclusionary rule, and, like its Fifth Amendment source, it is only violated at trial by the improper admission of incriminating statements.

Although the 50-plus page opinion sprawls over a wide range of topics, in the end *Miranda* is simply an exclusionary rule. The Court summarizes its own holding as this: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U. S., at 444 (emphasis added).

Miranda is not a rule separating voluntary from involuntary confessions. Instead, it creates a conclusive presumption that confessions not taken in accordance with its dictates are deemed involuntary without regard to whether they are in fact involuntary. "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Elstad*, 470 U. S., at 304, 307, n. 1 (emphasis in original). *Miranda*'s presumption reflects this Court's choice of the appropriate balance between the suspect's protection from interrogation and society's need to solve crimes. See, *e.g.*, *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests" (emphasis in original)); *New York* v. *Quarles*, 467 U. S. 649, 658 (1984). While the opinion declared that voluntary confessions were a "proper element in law enforcement," *Miranda*, 384 U. S., at 478, the *Miranda* Court chose to tilt the balance sharply in

favor of the criminal defendant. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). This balance executes this Court's policy concerning police interrogation under the Fifth Amendment.

Miranda and its subsequent decisions have noted the "inherently compelling pressures" of the interrogation room. See *Miranda*, 384 U. S., at 467; *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Moran*, 475 U. S., at 420. But this does not change the fact that the *Miranda* rule is only a presumption. While there may be some inherent pressure in any custodial interrogation, it must not be too compelling since *Miranda* still allows waivers under these circumstances. See 384 U. S., at 535-536 (White, J., dissenting).

There are many instances in which a suspect can give an unwarned, but still voluntary custodial confession. In his *Miranda* dissent, Justice White constructed a hypothetical where an unwarned suspect in police custody may blurt out a confession after being asked a single question such as " 'Do you have anything to say?' " or 'Did you kill your wife?' " This confession, while voluntary in fact, is suppressed under *Miranda*. See *id.*, at 533-534 (White, J., dissenting). As Judge Henry Friendly noted, "the books are full of instances, of which the Court must have been well aware through petitions for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967); see also *id.*, at 273, and nn. 33-36 (listing examples). In many cases after *Miranda*, confessions have been found or conceded to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, 470 U. S., at 318; *Oregon* v. *Hass*, 420 U. S. 714, 723 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

The policy that ties *Miranda*'s many strands together is dissatisfaction with administering the voluntariness standard. See Gardner, Section 1983 Actions under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30

Am. Crim. L. Rev. 1277, 1281-1282 (1993). This explains *Miranda*'s focus on custody. A station house can be very difficult for judicial scrutiny to penetrate. The *Miranda* rule finesses the problems with custody by overprotecting the Fifth Amendment privilege. See *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring).

Like its Fifth Amendment source, *Miranda* advances its policies through the exclusionary rule. See *Elstad*, 470 U. S., at 306. *Miranda* is only violated when incriminating statements are improperly admitted at trial. Thus, "courts should not care whether or not *Miranda* is violated so long as no evidence obtained from the violation is introduced against the person from whom it was obtained. Similarly, no police officer should be subject to a law suit for obtaining a confession in violation of *Miranda*." Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 917 (1989).

The case for limiting *Miranda* violations to improperly admitted testimony is even stronger than it is for Fifth Amendment violations in general. While a confession contrary to the Fifth Amendment must involve some sort of improper compulsion, *Miranda* can and does exclude voluntary confessions. Assessing civil damages through *Miranda*'s burdensome presumption is thus both unnecessary and unfair because the rule sweeps more broadly than the Fifth Amendment.

Any doubt that *Miranda* is exclusively a trial right is dispelled by its exceptions. While confessions obtained contrary to the *Miranda* rules are excluded from the government's case-in-chief, such statements are admissible for impeachment purposes. See *Harris*, 401 U. S., at 226. Exclusion from the main case provided enough of a deterrent to police. See *id.*, at 225. If a *Miranda* "violation" occurred at the time of the interrogation, then the fruits of the violation should be inadmissible under any circumstances. How can an officer who does not follow *Miranda* be found to violate the Constitu-

tion and be held liable for damages if it is constitutionally permissible to admit the product of that same interrogation for impeachment? In this hypothetical case, while the defendant has been incriminated, albeit indirectly by impeaching evidence, the interrogating officer who obtained this evidence could be found personally liable to the defendant, even though an appellate court would not overturn the defendant's conviction.

This demonstrates that *Miranda* did not establish a right to avoid interrogation. A suspect who gives an unwarned but voluntary statement "has suffered no identifiable constitutional harm." *Elstad*, 470 U. S., at 307. The Fifth Amendment is not violated until the statement taken contrary to *Miranda* is improperly admitted into evidence. While it is common to refer to a suspect's "*Miranda* rights" and to the conduct of police as a "*Miranda* violation," these are misnomers. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde* v. *United States*, 225 U. S. 347, 391 (1912) (Holmes, J., dissenting). While they are usually harmless, such terms should not deflect the focus from *Miranda* as a trial right. As "*Miranda* safeguards 'a fundamental *trial* right,' " the Fifth Amendment self-incrimination privilege, *Withrow* v. *Williams*, 507 U. S. 680, 691 (1993) (quoting *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990)) (emphasis added in *Withrow*), "a simple failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment." *Elstad*, *supra*, at 306, n. 1. This exclusionary rule no more supports civil liability than the Fifth Amendment it serves.

Just like the Fifth Amendment it serves, the *Miranda* presumption does not create a right to be free from questioning. "The evil the *Miranda* Court meant to eliminate arises not from the privacy intrusion—the questioning of the suspect—but from the *use* of compelled statements against him. Such *use* is the gravamen of a violation of the fifth amendment privilege against self-incrimination." Gardner, The Emerging Good

Faith Exception to the *Miranda* Rule—A Critique, 35 Hastings L. J. 429, 451-452 (1984). The Ninth Circuit's arguments to the contrary, see *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001), are simply incorrect.

The fact that this Court recently affirmed *Miranda*'s constitutional status in *Dickerson* v. *United States*, 530 U. S. 428 (2000), does not change the analysis. *Dickerson* struck down 18 U. S. C. § 3501, Congress' attempt to supplant *Miranda* with a totality of the circumstances test for voluntariness. The *Dickerson* Court noted that language in some cases implied that the *Miranda* rule was not a constitutional right. See *Dickerson*, *supra*, at 437-438. The doubts about *Miranda*'s constitutionality were resolved by the fact that this Court consistently applied the *Miranda* rule to the states. If *Miranda* was not a constitutional decision, then it could not be applied to state court convictions. See *id.*, at 438. Further proof of *Miranda*'s status was found in language from *Miranda* itself. See *id.*, at 440.

Dickerson illuminated the landscape rather than changed it. The presence of exceptions to *Miranda* did not negate its constitutional status, and therefore survived the *Dickerson* decision. "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable." *Id.*, at 441. Because *Miranda* was so embedded in police practice and our culture, "the principles of *stare decisis* weigh heavily against overruling it now." *Id.*, at 443. The fact that the *Miranda* presumption overprotects the Fifth Amendment was also left untouched. "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Id.*, at 444. *Dickerson* simply reaffirmed the status quo.

While *Miranda* extended the reach of the Fifth Amendment privilege into the interrogation room, it did not expand the scope of the right. The privilege against self-incrimination is

still a trial right and therefore is only enforced through its exclusionary rule. Certain extreme forms of interrogation can support an action under 42 U. S. C. § 1983, see *infra*, at 27-30, but they are not covered by the Fifth Amendment or the *Miranda* presumption or raised by the facts of this case.

III. An interrogation contrary to the procedural due process voluntariness standard is not sufficient to support a civil rights action.

Interrogations can produce constitutional torts that support an action under 42 U. S. C. § 1983. A brutal interrogation such as the one in the notorious case of *Brown* v. *Mississippi*, 297 U. S. 278, 281-282 (1936) would now produce both civil liability under § 1983 and criminal prosecution. See *Williams* v. *United States*, 341 U. S. 97, 101-102 (1951) (criminal prosecution). But the *Brown* decision itself only involved the exclusion of evidence, not civil liability. In *Brown*, this Court held that due process required the exclusion of a confession obtained through such methods. See 297 U. S., at 286. *Brown* and successive Supreme Court opinions have established that admitting an involuntary confession in a criminal trial violates due process. Like the self-incrimination privilege, this line of cases regulates the admissibility of evidence, and it is thus an aspect of procedural due process. While some interrogation methods that produce involuntary confessions will support a civil rights action, many will not. Procedural due process excludes the fruits of interrogations that involve far less coercion than in *Brown*. See *infra*, at 25-26.

The standard of the procedural due process line of cases was created for a different purpose and is not suited as the standard for civil liability. The proper scope of civil or criminal liability for interrogations is the standard of substantive due process. See *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Sergeant Chavez did not cross the line of a properly defined substantive due process standard, and he is entitled to qualified immunity.

A. Procedural Due Process and Evidence.

Analysis of the due process confession cases begins with an understanding of how this Court uses the term "coercion." Some form of official coercion is a prerequisite to invalidating a confession under due process. See *Colorado* v. *Connelly*, 479 U. S. 157, 164 (1986). However, the scope of what is considered "coercion" is now far greater than just force or the threat of force. The prohibition against "coerced" confessions now also regulates "more subtle forms of psychological persuasion . . . ." *Ibid.* The term "coercion," while constitutionally significant, is best seen as a label for "the crucial element of police overreaching." See *id.*, at 163. While the coercive conduct must be "substantial," see *id.*, at 164, it need not involve "gross abuses . . . ." *Mincey* v. *Arizona*, 437 U. S. 385, 401 (1978).

Coercion cannot be separated from the concept of voluntariness. While coercion is integral to any due process violation, the test for determining a confession's constitutionality under due process is a "voluntariness test." See *Dickerson* v. *United States*, 530 U. S. 428, 434 (2000). The two concepts are so closely related that "prior cases have used the terms 'coerced confession' and 'involuntary confession' interchangeably 'by way of convenient shorthand.' " *Arizona* v. *Fulminante*, 499 U. S. 279, 287, n. 3 (1991) (quoting *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960)). The voluntariness test "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson*, *supra*, at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973)). The relevant inquiry includes "the totality of all surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, at 226. Therefore, when a court labels a confession as "involuntary" or "coerced" it is important to understand that this term is a label that describes a complex inquiry. See *Miller* v. *Fenton*, 474 U. S. 104, 116 (1985). Practices that are not particularly

"coercive" as that term is commonly understood, like inducements, can still render a confession involuntary by overcoming the suspect's will. See *supra*, at 25-26.

It is similarly important to understand how the due process clause regulates confessions. Like the self-incrimination privilege, the *Brown* line regulates confessions through the exclusion of involuntary confessions. Thus the due process question frequently is framed in the context of excluding evidence. See, *e.g.*, *Haynes* v. *Washington*, 373 U. S. 503, 504 (1963) (deciding "whether the *admission* of the petitioner's . . . confession *into evidence against him at trial* constituted a denial of due process of law" (emphasis added)); *Spano* v. *New York*, 360 U. S. 315, 315 (1959) (raising the issue of whether the defendant's "confession was properly admitted under the Fourteenth Amendment"). " 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' " *Connelly*, 479 U. S., at 167 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)).

The prohibition against the use of involuntary or coerced confessions that has evolved since *Brown* is a form of procedural due process. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 465 (1994) ("Most, if not all, coerced confession cases are procedural due process cases"). An early due process confession case characterized the prohibition against the admission of involuntary confessions as a matter of procedural due process. See *Chambers* v. *Florida*, 309 U. S. 227, 237 (1940). Prohibiting the taking and subsequent use of involuntary confessions is a matter of fundamental fairness, see, *e.g.*, *Connelly*, 479 U. S., at 167; *Miller*, 474 U. S., at 110; *Michigan* v. *Tucker*, 417 U. S. 433, 441 (1974), which is a component of a procedural due process inquiry. See, *e.g.*, *Medina* v. *California*, 505 U. S. 437, 448 (1992); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320 (1985).

The importance of fair procedures separates procedural from substantive due process. Substantive due process raises a standard "barring certain government actions regardless of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); see also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Connecticut Dept. of Public Safety* v. *Doe*, No. 01-1231, at 4-7. Since the voluntariness standard guarantees a fair procedure—a trial free from involuntary confessions—this guarantee should not be characterized as part of a substantive due process inquiry that looks beyond whether the action was implemented in a fair manner. Given its basis in the exclusion of evidence and fundamental fairness, the voluntary confession requirement is part of procedural due process.

Procedural due process only requires the state provide the procedure that is due, not any particular result. See *Walters*, 473 U. S., at 321. In criminal cases, this is a fair trial, see *Daniels*, 474 U. S., at 337 (Stevens, J., concurring), a trial with all the procedures required under due process. In the context of the voluntary confession requirement, that is a trial where an involuntary confession is not admitted against the defendant. Therefore, due process is not violated unless an involuntary confession is used to incriminate the defendant at trial.

Coercion alone will not support a procedural due process violation. As the immunity cases demonstrate, coercive interrogation is constitutional when the threat of self-incrimination is removed. See *Kástigar* v. *United States*, 406 U. S. 441, 448-449 (1972) (the government can compel testimony if the speaker is granted immunity). The threat of imprisonment for failing to answer the government's questions is much more coercive than the "more subtle" forms of persuasion proscribed by the Due Process Clause. Cf. *Connelly*, 479 U. S., at 164.[2]

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2. Although the coerced confession test comes from due process rather than the Fifth Amendment, there should be little difference between the level of compulsion that violates procedural due process and that which violates the Fifth Amendment. *Brown* was decided before the incorporation of the Fifth Amendment. The fact that due process is still used to analyze involuntary confessions is a "historical accident." *Cooper* v. *Dupnik*, 924 F. 2d 1520, 1529, n. 17 (CA9 1991), rev'd, *Cooper* v. *Dupnik*, 963 F. 2d 1220 (CA9 1992) (en banc).

Without incrimination, there is no procedural due process violation.

B. Due Process and Policy.

Allowing civil damages for violations of the procedural due process voluntariness standard also threatens public safety. Police interrogation is a public good, not a necessary evil. The *Miranda* decision recognized that confessions are a "proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966). "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth*, 412 U. S., at 225. " 'Questioning suspects is indispensable in law enforcement.' " *Culombe* v. *Connecticut*, 367 U. S. 568, 578 (1961) (opinion of Frankfurter, J.).

It is true that the benefit to society is limited to voluntary confessions. Cf. *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991) ("Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . ."). If the line between voluntary and involuntary confessions were clear, then there would be no additional cost to society for adding civil liability to the remedies for failing to adhere to the voluntariness standard. Unfortunately, the voluntariness test is far from clear.

"The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw . . . ." *Haynes*, 373 U. S., at 515. Dissatisfaction with applying the voluntariness test was a motivation behind *Miranda*'s comparatively bright-line rule. See *Michigan* v. *Mosley*, 423 U. S. 96, 113 (1975) (Brennan, J.,

dissenting); Stone, The *Miranda* Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, 102-104. One reason for the *Miranda* rule is that it provides at least a "brighter-line" rule than the due process standard. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993).

A myriad of objective and subjective factors governs the voluntariness inquiry. "Those potential circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." *Id.*, at 693 (citations omitted). This "exhaustive totality-of-circumstances approach," see *id.*, at 694, is further complicated by the elusive concept of voluntariness.

> "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." Bator & Vorenberg, Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62, 72-73 (1966).

Therefore, the due process standard has been rightly criticized as giving too little guidance to the police. See Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 869 (1991). The inherent subjectivity of determining when the suspect's "will was overborne," *Schneckloth*, 412 U. S., at 226, further complicates the inquiry. Determining one's will is inherently subjective. Thus factors such as the suspect's education, intelligence, or adaptation to the stress of incarceration influence the admissibility of the confession under the

voluntariness standard. See *Fulminante*, 499 U. S., at 286, n. 2. This means that interrogation that is acceptable in some contexts can render the confession inadmissible due to certain characteristics of the suspect, which further complicates an already muddled issue.

This Court has recognized the considerable criticism of the voluntariness standard. See *Miller*, 474 U. S., at 116, n. 4. The complexity of this standard was a substantial reason to not apply the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda*. Precluding *Miranda* claims from federal habeas corpus would not lessen the workload of the federal courts, because the *Miranda* inquiry would be replaced by the considerably more complex voluntariness issue. See *Withrow*, 507 U. S., at 693-694.

The threat of civil litigation can deter public employees from exercising their duties properly. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). While the qualified immunity defense is predicated upon providing government officials with an objective standard of liability, see *Wyatt* v. *Cole*, 504 U. S. 158, 166 (1992), the vagueness and subjectivity of the voluntariness standard threatens to overwhelm this defense.

Many confessions can be deemed involuntary yet not the product of particularly "coercive" interrogation, as that term is commonly understood. Promises by the interrogator can lead to a confession being declared involuntary. Thus courts have struck down confessions made in response to promises of "nonprosecution, the dropping of some charges, medical treatment, or a certain reduction in the punishment defendant may receive . . . ." See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.2(c), pp. 453-454 (2d ed. 1999) (footnotes omitted). For example, one court struck down a confession induced by a promise to help the defendant get counseling after confessing. See *People* v. *Shaw*, 180 Ill. App. 3d 1091, 1094-1096, 536 N. E. 2d 849, 851-852 (1989). This Court has struck down a confession induced by a promise from a police informant to protect the defendant from

his fellow prisoners, an admittedly "close question." See *Fulminante*, 499 U. S., at 287. It has also struck down a confession induced by a promise to a suspect in custody that he would be allowed to call his wife after confessing. See *Haynes*, 373 U. S., at 514. These cases illustrate that a confession can be involuntary even if there is little actual coercion or official misconduct. Civil liability should rest on sterner stuff.

The present case highlights the problems with the voluntariness standard. *Mincey* v. *Arizona*, 437 U. S. 385 (1978), the closest case, is distinguishable on several grounds. Mincey repeatedly asked for counsel, and the interrogation lasted continuously from 8:00 p.m. until midnight. The interview of Martinez took only around 45 minutes. See Pet. for Cert. 3. Martinez never asked for counsel, but only indicated twice that he would not answer any questions until he was treated. See *supra*, at 2.

The most important difference is that Martinez was never "compelled in any criminal case to be a witness against himself." Cf. U. S. Const., Amdt. 5. While Mincey's interview was used to impeach his testimony at his criminal trial, see 437 U. S., at 397, Martinez has not been prosecuted. See *supra*, at 2. Sergeant Chavez thought that Martinez was going to die. See Pet. for Cert. 3. If he had been right, then the interview would have been the only way to get Martinez's side of the story. The only ones who might have been threatened by the interview were the officers involved in the shooting. While Martinez lived to tell his story, this does not change the nature of the interview. *Miranda* would have prevented Martinez's statements from being used against him, but it would not have prevented any of his statements from being used for or against Officers Peña or Salinas in subsequent disciplinary, civil, or criminal proceedings. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317 (1976) (no Fifth Amendment violation without criminal prosecution). Allowing this comparatively benign interrogation to support civil liability threatens to straightjacket the police in the interrogation room.

The voluntariness standard in this case provided weak cover for finding civil liability for questioning contrary to *Miranda*. The vagueness of the procedural due process standard means that this will be repeated unless courts are foreclosed from basing civil liability upon questioning contrary to this procedural due process standard. While grossly improper interrogation can support civil liability, a more concrete standard and a greater level of harm are needed.

C. Alternatives.

Something more serious than a violation of the procedural due process voluntariness standard is needed to support civil liability for an interrogation.

> "Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails." *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230, 1244 (CA7 1990), rev'd on other grounds, *Buckley* v. *Fitzsimmons*, 509 U. S. 259 (1993).

This passage from the Seventh Circuit's opinion is taken in the context of allowing prosecutors absolute immunity for Fifth Amendment or *Miranda* violations because they involve trial rights. See 919 F. 2d, at 1244. It also asserts that coercive interrogation would only be afforded qualified immunity. See *ibid*. However, not every act of "coercion" involves pretrial harm to the suspect. Civil liability should be limited to gross coercions like those listed in the *Buckley* passage, but not the more subtle forms of coercion that also fall within the procedural due process standard.

Interrogators should be held liable under 42 U. S. C. § 1983 for violence, the deprivation of food, water, sleep, or other life necessities or threats to commit such wrongs against the suspect. This approach has several related advantages over the

voluntariness standard. First, it limits liability to clearly identifiable harms that are complete without regard to the admissibility of evidence. It also provides an objective standard that is much easier to understand than the murky voluntariness test. Finally, under this standard there is no real risk of deterring worthwhile, legal interrogation. Violence and deprivation, whether real or threatened, have no place in the interrogation room. More subtle forms of psychological pressure can produce constitutionally valid confessions in the right context. See *supra*, at 24-25.

This Court has once invoked due process to regulate interrogation through criminal sanctions on the interrogating officers. In *Williams* v. *United States*, *supra*, the Court held that officers who beat a confession out of a suspect could be prosecuted for violating the suspect's due process rights under the predecessor of 18 U. S. C. § 242. See 341 U. S., at 101-102. However, not every interrogation that resulted in an involuntary confession would necessarily lead to criminal sanction. "Some day the application of [18 U. S. C. § 242] to less obvious methods of coercion may be presented and doubts to the adequacy of the standard of guilt may be presented."[3] *Ibid.* In *Williams*, the suspects' interrogation consisted of brutal beatings and other forms of physical abuse. *Id.*, at 98-99. "Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys." *Id.*, at 101-102 (emphasis added).

This distinction has constitutional significance. Force, the threat of force, or the deprivation of food, water, or sleep during interrogation violates substantive due process. Unlike the procedural due process prohibition against the use of coerced

3. The standard of clarity of pre-existing law for finding civil liability under 42 U. S. C. § 1983 is the same as for finding criminal liability under 18 U. S. C. § 242. *United States* v. *Lanier*, 520 U. S. 259, 270-271 (1997).

confessions, this right is violated without regard to whether the suspect is in fact incriminated. The violation is complete with the beatings.

The Seventh Circuit's decision in *Buckley* has been characterized as a substantive due process holding. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 451-452 (1994). This Court has recognized that the use of force by government officials that "shocks the conscience" violates substantive due process. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998). Like any standard, this test can be misapplied. See Klein, *supra*, at 454; Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1307 (1993) (criticizing the substantive due process holding of *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1237 (CA9 1992) (en banc)). A properly calibrated standard as suggested by the Seventh Circuit's holding in *Buckley* provides adequate protection and an appropriately concrete standard.

The *Buckley* standard is also consistent with *Lewis*. The *Lewis* Court noted that the intentional infliction of harm is much more likely to shock the conscience than negligent or reckless harm. See 523 U. S., at 849. An interrogation practice that violates substantive due process will involve an intentional violation of the right, like a beating. Therefore there should be no difficulty in finding the conduct shocking to the court's conscience under the appropriate standard.

While other constitutional standards are available, they are wanting. This Court has left open the question of whether the Fourth Amendment's prohibition of unreasonable seizures applies to detainees after the arrest has been completed. See *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989). Extending the Fourth Amendment to pretrial detainees raises difficult questions, see *United States* v. *Cobb*, 905 F. 2d 784, 788, n. 7 (CA4 1990), that need not be answered in this case. *Graham* also mentioned that pretrial detainees had a due process right to

be free "from the use of excessive force that amounts to punishment." See 490 U. S., at 395, n. 10 (citing *Bell* v. *Wolfish*, 441 U. S. 520, 535-539 (1979)). Interrogation and prisoner rights are separate issues that should not be mixed. The substantive due process standard of *Buckley* does not need to be supplemented by *Bell*'s foreign standard.

The fact that a federal appellate court has allowed a § 1983 action for Sergeant Chavez's brief, comparatively benign questioning demonstrates the need to clarify the law. This Court should limit § 1983 liability for interrogation to the gross violation that leads to real harm other than the suspect's incriminating statement. Limiting money damages to physical harm, threats of harm, or substantial deprivations will afford suspects appropriate compensation, while limiting unwarranted assaults on police practices.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

September, 2002

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(5)

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Supreme Court of the United States

BEN CHAVEZ,

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vs.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

1) Is a police officer liable for damages in a civil action under 42 U. S. C. § 1983 for taking a statement from a suspect in a manner considered "compelled" for the Fifth Amendment's self-incrimination privilege?

2) Is a police officer liable in such an action for taking a statement without complying with the prophylactic rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966)?

3) Is a police officer liable in such an action for taking a statement in a manner that would render it inadmissible in a criminal trial under the procedural due process line of cases?

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IN THE

Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

vs.

OLIVERIO MARTINEZ,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Interrogating suspects is an integral part of criminal investigation. A proper interrogation regime is essential to a system that seeks to punish the guilty, protect the innocent, and preserve the rights of all. Creating an elaborate system of civil

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

liability for interrogation that is contrary to the rules of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) or the subjective, difficult to define due process voluntariness standard is regulatory overkill. It would needlessly deter police from interrogating suspects, resulting in lost voluntary confessions and the unwarranted compensation of those who have suffered no real harm. This is contrary to the interests of justice and society that the CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On November 28, 1987, the plaintiff, Oliverio Martinez, was stopped and frisked by police officers Maria Peña and Andrew Salinas as the officers were investigating drug activity in Oxnard, California. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 854 (CA9 2001). Officer Salinas found a knife in Martinez's waistband during the frisk, and a struggle ensued. At one point during the struggle, Officer Salinas cried out " 'He's got my gun.' " *Ibid.* Officer Peña drew her weapon and fired on Martinez several times, severely injuring him. See *ibid.*

The patrol supervisor, Sergeant Ben Chavez, soon arrived at the scene. He rode in the ambulance with Martinez in order to get his version of what happened. See *ibid.* At the hospital, Sergeant Chavez started a taped interview with Martinez as emergency room personnel began treatment. See *ibid.* The interview lasted over 45 minutes, but the transcript of the recorded conversations totaled approximately 10 minutes. See *id.*, at 854-855. Medical staff asked Sergeant Chavez to leave the trauma room several times, but he returned and continued questioning. See *id.*, at 854. Most of Martinez's responses to the questioning were complaints about his physical condition, such as his pain or his inability to move his legs, or repeated requests for treatment. See *id.*, at 855. Martinez twice stated that he did not want to talk anymore. See *ibid.* During the interview, he "drifted in and out of consciousness." See *ibid.*

"Martinez's statements were not used against him in a criminal proceeding," *id.*, at 857, because he "was not charged with a crime as a result of the incident." See District Court Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication, Part III (Aug. 1, 2000), App. to Pet. for Cert. 16a.

Martinez filed suit under 42 U. S. C. § 1983, alleging that the defendants violated his constitutional rights "by stopping him without probable cause, using excessive force, and subjecting him to a coercive interrogation while he was receiving medical care." *Martinez*, 270 F. 3d, at 855. The District Court denied Sergeant Chavez's qualified immunity defense and "granted summary judgment for Martinez on his claim that Chavez violated his Fifth and Fourteenth Amendment rights by coercing statements from him during medical treatment." *Ibid.* (footnote omitted). Chavez brought an interlocutory appeal, claiming that he was entitled to qualified immunity. *Ibid.* The Ninth Circuit denied the appeal, holding that the questioning violated Martinez's Fifth Amendment rights, "[e]ven though Martinez's statements were not used against him in a criminal proceeding . . . ." *Id.*, at 857. The Ninth Circuit also held that the interrogation violated the due process proscription against coerced confessions, and that for this right the " 'violation is complete with the coercive behavior itself . . . .' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1244-1245 (CA9 1992) (en banc)). It concluded that "[i]n light of the extreme circumstances of this case, a reasonable police officer in Sergeant Chavez's position could not have believed that the interrogation of suspect Martinez comported with the Fifth and Fourteenth Amendments," and it affirmed the District Court decision to deny qualified immunity. See *id.*, at 859.

SUMMARY OF ARGUMENT

The Fifth Amendment self-incrimination privilege does not support a civil rights action. By its own terms it is an exclusionary rule that is only violated by the admission of compelled incriminating testimony. Because the violation is not complete until self-incriminating statements are improperly admitted, the Fifth Amendment cannot be violated during interrogation. As the immunity cases demonstrate, the Fifth Amendment does not create a right to be free from questioning under compulsion, but only a right to be free from compelled self-incrimination.

The policy behind the privilege is stated in the Fifth Amendment, keeping the government from forcing individuals to furnish evidence that can prove their guilt. This is satisfied by its exclusionary rule. Other policies, such as privacy, evidentiary reliability, and the accusatorial nature of our system do not justify expanding the privilege to include a civil remedy. The exclusionary rule is not just a remedy here, it is an integral part of the Fifth Amendment. Welding a civil cause of action onto the privilege will needlessly deter proper police interrogation of suspects.

The *Miranda* rule does not change the analysis. *Miranda* created an irrebuttable presumption; confessions taken contrary to its procedures are deemed compelled without regard to whether they were in fact compelled. This rule did not create any new remedies, but is a rule of evidence given constitutional force through the Fifth Amendment. Like the Fifth Amendment it serves, a *Miranda* violation is incomplete without the improper admission of a confession taken contrary to its rules. Therefore interrogation contrary to *Miranda* without improper incrimination rules does not violate the Constitution and thus cannot support civil liability. Any doubts that *Miranda* cannot be violated during interrogation is dispelled by the numerous exceptions to the rule. Because the *Miranda* rule excludes both compelled and voluntary confessions, adding a civil remedy

will needlessly compound the already high cost of *Miranda* in lost voluntary confessions.

The fact that this Court recently clarified that *Miranda* is a constitutional rule changes nothing. *Dickerson* v. *United States* kept the status quo by leaving *Miranda* and its exceptions intact. Because the exclusionary rule is inseparable from *Miranda*, *Miranda* cannot support a civil rights action.

While due process can support a civil rights action for improper interrogation, the due process voluntariness standard is not a source of civil liability. The cases prohibiting involuntary or coerced confessions deal with the exclusion of evidence and fundamental fairness, concepts associated with procedural due process. The process due is no more than a trial free from an involuntary confession. Like the Fifth Amendment, this procedural due process right is only violated by the admission of an involuntary confession. Therefore, it does not support a civil rights action.

There are also strong practical reasons for avoiding civil liability. The voluntariness standard has proven notoriously difficult to implement. Overbearing the will is not easily defined, and the test is necessarily subjective. As the inducement cases demonstrate, a confession can be deemed involuntary with little real coercive interrogation. Civil liability should not be based on such a weak standard.

Substantive due process provides the standard for assessing civil liability for interrogation. Unlike procedural due process, the substantive due process violation is complete with the improper interrogation. Under this standard, civil liability should be limited to interrogation involving force, the deprivation of food, water, or sleep, or threats of force or deprivation. Such techniques are never proper, and can be said to "shock the conscience" of the court. They are also objective and easily defined. This distinction between violent interrogation and merely involuntary confessions has received some implicit recognition from this Court. It is now time for explicit approval

by dismissing civil liability for the comparatively benign interrogation in this case.

ARGUMENT

This case is about the relationship between rights and remedies. While it is an old maxim that rights must have remedies, see, *e.g.*, *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 163 (1803), this does not "establish that the individual's protection must come in the form of a particular remedy." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 755, n. 37 (1982). In the Fifth Amendment's self-incrimination privilege, the remedy, excluding incriminating statements, is part of the right. Because a Fifth Amendment violation is not completed until incriminating statements are improperly admitted, exclusion is the sole remedy. The procedural due process right against the use of involuntary confession operates in the same way. Civil remedies for interrogation are limited to violations of substantive due process. This involves extreme behavior like torture, threats of violence, or the deprivation of food, water, or sleep. Because substantive due process was not violated in this case, there is no civil remedy for the interrogation.

I. The Fifth Amendment's self-incrimination privilege is only a right to have evidence excluded, and therefore does not support a civil rights action.

A. An Exclusionary Rule.

The Ninth Circuit's Fifth Amendment holding centers on the theory that a Fifth Amendment violation occurs at the moment of "compulsion" at the police station. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 856-857 (CA9 2001). This premise is fundamentally erroneous.

The Fifth Amendment's self-incrimination privilege is not a right to be free from compulsion, but rather from compelled

self-incrimination. The Fifth Amendment privilege is essentially an exclusionary rule. Although the legislative history of the Fifth Amendment adds little to our understanding of the privilege, see *United States* v. *Balsys*, 524 U. S. 666, 674, n. 5 (1998), the text demonstrates that the self-incrimination privilege centers on the use of evidence in the criminal trial. "No person . . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5. The privilege applies to attempts to compel in proceedings other than the criminal trial, see *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), but the scope of the privilege is still limited to actual incrimination. See *id.*, at 77.

Therefore, while compulsion is a necessary condition for a Fifth Amendment violation, it is not a sufficient condition for the self-incrimination privilege. If the threat of incrimination is eliminated, then the government can compel a witness to testify. See *Kastigar* v. *United States*, 406 U. S. 441, 448-449 (1972). Similarly, a prison disciplinary board may draw negative inferences from the prisoner's silence at the disciplinary hearing when that silence is not used in any criminal proceeding. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317-318 (1976). Where there is no threat of incrimination, the privilege is unnecessary.

The act of being interrogated can have adverse consequences other than self-incrimination, but this is irrelevant to the Fifth Amendment analysis. In *Brown* v. *Walker*, 161 U. S. 591 (1896), a grand jury witness invoked the privilege with regard to questions concerning crimes for which he could not be held liable. See *id.*, at 609. Justice Field's dissent contended, "The [Fifth] amendment also protects him from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed may not lead to a criminal prosecution." *Id.*, at 631. This majority rejected that argument.

> "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him

of a criminal charge. If he secure himself legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good." *Id.*, at 605-606.

This is "black letter law . . . ." *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 273 (1983) (Blackmun, J., concurring in the judgment).

"[T]he privilege itself is *defined* in terms of the incriminating effect of truthful testimony . . . ." *United States* v. *Apfelbaum*, 445 U. S. 115, 134 (1980) (Blackmun, J., concurring in the judgment) (emphasis in original). It is only violated when evidence is improperly admitted at trial. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. [Citation.] Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial*." *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990) (emphasis added). Although dicta, the *Verdugo-Urquidez* statement is the correct rule of law.

The Fifth Amendment privilege "*is* an exclusionary rule—and a constitutionally created one." Dershowitz & Ely, *Harris* v. *New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L. J. 1198, 1214 (1971) (emphasis in original). Because the privilege is not violated until the improper admission of self-incriminating testimony, exclusion is the *only* proper means to enforce the Fifth Amendment. If there is no evidence to exclude or no criminal trial to exclude it from, then there is no violation of the privilege. In that event, there is nothing to "remedy." This differs from the Fourth Amendment's exclusionary rule. Fourth Amendment violations are complete before trial, at the time of the illegal search. See *Verdugo-Urquidez*, 494 U. S., at 264. The Fourth Amendment exclusionary rule is a judicially constructed remedy intended to deter police from violating that right. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984). Exclusion of evidence is not

a remedy for past violations of the Fifth Amendment privilege; it *is* the right itself.

In addition to comporting with constitutional text and this Court's precedents, denying civil liability for Fifth Amendment violations is the fairer approach. While police officers may produce an inadmissable statement through improper interrogation, the confession cannot be unconstitutionally admitted without the acquiescence of the trial judge and the prosecutor. These actors, with far more expertise in Fifth Amendment admissibility issues, are absolutely immune from civil liability for the improper admission of evidence at trial. See *Imbler* v. *Pachtman*, 424 U. S. 409, 427-428 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U. S. 547, 554-555 (1967) (judges). Police officers would be left holding the bag although the more responsible actors are immune. Cf. *Duncan* v. *Nelson*, 466 F. 2d 939, 942 (CA7 1972) (police officers who coerced the confession were not the proximate cause of its admission because they could not foresee that the judge would admit it).

B. Policy and the Privilege.

The Ninth Circuit's decision that the Fifth Amendment self-incrimination privilege can be violated even though the suspect was never incriminated relies on Fifth Amendment policy. See *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001). It followed Ninth Circuit precedent holding that one purpose of the Fifth Amendment "is to prevent coercive interrogation practices that are 'destructive of human dignity.' " *Ibid.* (quoting *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1239 (CA9 1992) (en banc) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 457 (1966)). This is an unwarranted extension of *Miranda*. Like the Fifth Amendment it serves, *Miranda* is a trial right. It does not support a civil remedy because it is inseparable from the exclusion of evidence. See part II, *infra*. The Ninth Circuit's holding is also an improper application of extraneous policy to the self-incrimination privilege. The only policy behind the privilege is found in its text, preventing self-incrimination at

trial. While a source of other Fifth Amendment policies exists, it has been diminished, and does not justify expanding the Fifth Amendment.

An often quoted statement of policy justifications for the Fifth Amendment privilege is found in a famous passage from *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964). That passage lists numerous policy justifications for the privilege, including rationales as diverse as a "sense of a fair play" and "respect for the inviolability of the human personality . . . ." See *id.*, at 55. This collection of policies does not justify expanding the Fifth Amendment beyond its exclusionary rule.

Murphy is a diminished precedent. Its examination of the historical treatment of the relationship between the threat of foreign prosecution and the self-incrimination privilege has been overruled. See *Balsys* v. *United States*, 524 U. S. 666, 687-688 (1999). *Balsys* also critically reexamined the *Murphy* policies. In *Balsys*, the Justice Department's Office of Special Investigations (OSI), "which was created to institute denaturalization and deportation proceedings against suspected Nazi war criminals," was investigating Balsys. See *id.*, at 670. The OSI asked Balsys about his wartime activities between 1940 and 1944, but he invoked the self-incrimination privilege, claiming a fear of prosecution in a foreign nation. *Id.*, at 669. This Court rejected that claim.

In addition to rejecting *Murphy*'s use of history to support Balsys' position, the *Balsys* Court also declined to rely on *Murphy*'s list of Fifth Amendment principles in order to expand the privilege. This Court established that "at its [the Fifth Amendment's] heart lies the principle that the courts of a government fr m which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt." *Id.*, at 683. The policies and aspirations listed in *Murphy* did not justify expanding the privilege beyond that principle:

> "we think there would be sound reasons to stop short of resting an expansion of the Clause's scope on the highly general statements of policy expressed in . . . . *Murphy*. While its list does indeed catalog aspirations furthered by the Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope." *Id.*, at 691.

Of particular importance is how this Court dealt with one of the broadest of the *Murphy* policies, "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." 378 U. S., at 55. If allowed to define the scope of the Fifth Amendment privilege, this principle "would necessarily seem to include protection against the Government's very intrusion through involuntary interrogation." *Balsys*, 524 U. S., at 691. Since " 'inviolability' is after all, an uncompromising term," then as with the Fourth Amendment, breaches would occur "at the moment of illicit intrusion, whatever use may or may not be made of their fruits." *Id.*, at 692. This Court refused to stretch the self-incrimination privilege beyond its traditional boundary. "The Fifth Amendment tradition, however, offers no such degree of protection." *Ibid.* The immunity cases demonstrated that the privilege allows testimony to be compelled so long as the compulsion is accompanied by an appropriate protection from incrimination. See *ibid.* Personal inviolability is simply inconsistent with Fifth Amendment practice and precedent. "Thus, what we find in practice is not the protection of personal testimonial inviolability, but a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years." *Id.*, at 692-693 (footnote omitted). This conditional testimonial privacy is enforced through the exclusion of evidence, and not through civil liability. The Ninth Circuit's notion that the privilege can be violated without actual incrimination cannot be reconciled with *Balsys*.

Since many of the *Murphy* values are either too vague to be meaningful or restatements of the privilege, see Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1312 (1993), analyzing each of them is unnecessary. In addition to human dignity, two other values have been suggested as being central to the self-incrimination privilege—preserving evidentiary reliability and protecting the accusatorial nature of the system. See *ibid.* Neither supports expanding the Fifth Amendment beyond its exclusionary rule.

Evidentiary reliability is protected by the Fifth Amendment's exclusionary rule. The threat of civil liability adds nothing, particularly since the prosecutors that submit and the judges who admit the incriminating statements are immune from liability. See *supra*, at 9. Also, many police-initiated Fifth Amendment violations will not be unreliable. Police interrogation is subject to the Fifth Amendment through *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Miranda*'s presumption excludes both reliable and unreliable confessions, see *infra*, at 14, thus reducing the marginal benefit to reliability. Imposing civil liability for noncompliance with the *Miranda* procedures regardless of whether the confession obtained is reliable will add little or nothing to the reliability of evidence.

The accusatorial nature of our system does not change the fact that police interrogation is indispensable to it. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). Even more importantly, creating a civil remedy will not give any added protection to the accusatory system. The Fifth Amendment's exclusionary rule prevents the prosecution from taking any unfair advantage of a Fifth Amendment violation. Welding a civil remedy onto the Fifth Amendment serves no purpose other than to discourage interrogation.

It is important to place the cost of this over-deterrence in its proper context. A major consequence of the *Miranda* decision is a significant decrease in the frequency of confessions obtained by police. See, *e.g.*, Cassell & Hayman, Police

Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*, 43 UCLA L. Rev. 840, 917 (1996); Cassell, *Miranda*'s Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 416-418 (1996). Potential voluntary confessions were lost because police either scrupulously followed *Miranda* or even went beyond the *Miranda* requirements. See Cassell & Hayman, *supra*, at 920. Civil liability for Fifth Amendment violations compounds this cost by adding more over-deterrence to the system. *Miranda* already makes police stop short of the actual constitutional limit of permissible interrogation. Adding civil liability will move them even further away, allowing the guilty to go free, and innocent suspects to remain under suspicion. See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 680-681 (1968) ("A man in suspicious circumstance but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . .").

Balsys provides the best approach to defining the Fifth Amendment's scope. The privilege should remain grounded in its primary purpose, preventing the government from using compelled testimony to prove the suspect's guilt. A civil remedy adds nothing to this goal while harming society by unnecessarily deterring police interrogation of suspected criminals. As in *Balsys*, precedent, constitutional text, and practicality all argue against expanding the Fifth Amendment.

II. *Miranda*'s irrebuttable presumption does not support a civil remedy for Fifth Amendment violations.

Because the police are the only individuals likely to be held civilly liable for Fifth Amendment violations, see *supra*, at 9, *Miranda* v. *Arizona*, 384 U. S. 436 (1966) would be the source of any civil rights case for alleged Fifth Amendment violations. While that landmark decision dramatically expanded the Fifth Amendment's reach, it did not add any new remedies. *Miranda*

is a rule of evidence given constitutional force through the Fifth Amendment's self-incrimination privilege. The product of an interrogation that does not comport with *Miranda* and its permutations, see, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981), is presumed to be involuntary without regard to whether it was in fact involuntary. *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985). This rule of evidence should only be implemented by an exclusionary rule, and, like its Fifth Amendment source, it is only violated at trial by the improper admission of incriminating statements.

Although the 50-plus page opinion sprawls over a wide range of topics, in the end *Miranda* is simply an exclusionary rule. The Court summarizes its own holding as this: "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U. S., at 444 (emphasis added).

Miranda is not a rule separating voluntary from involuntary confessions. Instead, it creates a conclusive presumption that confessions not taken in accordance with its dictates are deemed involuntary without regard to whether they are in fact involuntary. "A *Miranda* violation does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." *Elstad*, 470 U. S., at 304, 307, n. 1 (emphasis in original). *Miranda*'s presumption reflects this Court's choice of the appropriate balance between the suspect's protection from interrogation and society's need to solve crimes. See, *e.g.*, *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests" (emphasis in original)); *New York* v. *Quarles*, 467 U. S. 649, 658 (1984). While the opinion declared that voluntary confessions were a "proper element in law enforcement," *Miranda*, 384 U. S., at 478, the *Miranda* Court chose to tilt the balance sharply in

favor of the criminal defendant. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). This balance executes this Court's policy concerning police interrogation under the Fifth Amendment.

Miranda and its subsequent decisions have noted the "inherently compelling pressures" of the interrogation room. See *Miranda*, 384 U. S., at 467; *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Moran*, 475 U. S., at 420. But this does not change the fact that the *Miranda* rule is only a presumption. While there may be some inherent pressure in any custodial interrogation, it must not be too compelling since *Miranda* still allows waivers under these circumstances. See 384 U. S., at 535-536 (White, J., dissenting).

There are many instances in which a suspect can give an unwarned, but still voluntary custodial confession. In his *Miranda* dissent, Justice White constructed a hypothetical where an unwarned suspect in police custody may blurt out a confession after being asked a single question such as " 'Do you have anything to say?' " or 'Did you kill your wife?' " This confession, while voluntary in fact, is suppressed under *Miranda*. See *id.*, at 533-534 (White, J., dissenting). As Judge Henry Friendly noted, "the books are full of instances, of which the Court must have been well aware through petitions for certiorari, where it is evident that in-custody interrogation did not represent the exercise of compulsion." H. Friendly, Benchmarks 272-273 (1967); see also *id.*, at 273, and nn. 33-36 (listing examples). In many cases after *Miranda*, confessions have been found or conceded to be voluntary even though they were taken contrary to the *Miranda* procedures. See, *e.g.*, *Elstad*, 470 U. S., at 318; *Oregon* v. *Hass*, 420 U. S. 714, 723 (1975); *Michigan* v. *Tucker*, 417 U. S. 433, 449 (1974); *Harris* v. *New York*, 401 U. S. 222, 224 (1971).

The policy that ties *Miranda*'s many strands together is dissatisfaction with administering the voluntariness standard. See Gardner, Section 1983 Actions under *Miranda:* A Critical View of the Right to Avoid Interrogation, 30

Am. Crim. L. Rev. 1277, 1281-1282 (1993). This explains *Miranda*'s focus on custody. A station house can be very difficult for judicial scrutiny to penetrate. The *Miranda* rule finesses the problems with custody by overprotecting the Fifth Amendment privilege. See *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring).

Like its Fifth Amendment source, *Miranda* advances its policies through the exclusionary rule. See *Elstad*, 470 U. S., at 306. *Miranda* is only violated when incriminating statements are improperly admitted at trial. Thus, "courts should not care whether or not *Miranda* is violated so long as no evidence obtained from the violation is introduced against the person from whom it was obtained. Similarly, no police officer should be subject to a law suit for obtaining a confession in violation of *Miranda*." Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 917 (1989).

The case for limiting *Miranda* violations to improperly admitted testimony is even stronger than it is for Fifth Amendment violations in general. While a confession contrary to the Fifth Amendment must involve some sort of improper compulsion, *Miranda* can and does exclude voluntary confessions. Assessing civil damages through *Miranda*'s burdensome presumption is thus both unnecessary and unfair because the rule sweeps more broadly than the Fifth Amendment.

Any doubt that *Miranda* is exclusively a trial right is dispelled by its exceptions. While confessions obtained contrary to the *Miranda* rules are excluded from the government's case-in-chief, such statements are admissible for impeachment purposes. See *Harris*, 401 U. S., at 226. Exclusion from the main case provided enough of a deterrent to police. See *id.*, at 225. If a *Miranda* "violation" occurred at the time of the interrogation, then the fruits of the violation should be inadmissible under any circumstances. How can an officer who does not follow *Miranda* be found to violate the Constitu-

tion and be held liable for damages if it is constitutionally permissible to admit the product of that same interrogation for impeachment? In this hypothetical case, while the defendant has been incriminated, albeit indirectly by impeaching evidence, the interrogating officer who obtained this evidence could be found personally liable to the defendant, even though an appellate court would not overturn the defendant's conviction.

This demonstrates that *Miranda* did not establish a right to avoid interrogation. A suspect who gives an unwarned but voluntary statement "has suffered no identifiable constitutional harm." *Elstad*, 470 U. S., at 307. The Fifth Amendment is not violated until the statement taken contrary to *Miranda* is improperly admitted into evidence. While it is common to refer to a suspect's "*Miranda* rights" and to the conduct of police as a "*Miranda* violation," these are misnomers. "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde* v. *United States*, 225 U. S. 347, 391 (1912) (Holmes, J., dissenting). While they are usually harmless, such terms should not deflect the focus from *Miranda* as a trial right. As "*Miranda* safeguards 'a fundamental *trial* right,' " the Fifth Amendment self-incrimination privilege, *Withrow* v. *Williams*, 507 U. S. 680, 691 (1993) (quoting *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990)) (emphasis added in *Withrow*), "a simple failure to administer *Miranda* warnings is not itself a violation of the Fifth Amendment." *Elstad*, *supra*, at 306, n. 1. This exclusionary rule no more supports civil liability than the Fifth Amendment it serves.

Just like the Fifth Amendment it serves, the *Miranda* presumption does not create a right to be free from questioning, "The evil the *Miranda* Court meant to eliminate arises not from the privacy intrusion—the questioning of the suspect—but from the *use* of compelled statements against him. Such *use* is the gravamen of a violation of the fifth amendment privilege against self-incrimination." Gardner, The Emerging Good

Faith Exception to the *Miranda* Rule—A Critique, 35 Hastings L. J. 429, 451-452 (1984). The Ninth Circuit's arguments to the contrary, see *Martinez* v. *City of Oxnard*, 270 F. 3d 852, 857 (CA9 2001), are simply incorrect.

The fact that this Court recently affirmed *Miranda*'s constitutional status in *Dickerson* v. *United States*, 530 U. S. 428 (2000), does not change the analysis. *Dickerson* struck down 18 U. S. C. § 3501, Congress' attempt to supplant *Miranda* with a totality of the circumstances test for voluntariness. The *Dickerson* Court noted that language in some cases implied that the *Miranda* rule was not a constitutional right. See *Dickerson*, *supra*, at 437-438. The doubts about *Miranda*'s constitutionality were resolved by the fact that this Court consistently applied the *Miranda* rule to the states. If *Miranda* was not a constitutional decision, then it could not be applied to state court convictions. See *id.*, at 438. Further proof of *Miranda*'s status was found in language from *Miranda* itself. See *id.*, at 440.

Dickerson illuminated the landscape rather than changed it. The presence of exceptions to *Miranda* did not negate its constitutional status, and therefore survived the *Dickerson* decision. "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable." *Id.*, at 441. Because *Miranda* was so embedded in police practice and our culture, "the principles of *stare decisis* weigh heavily against overruling it now." *Id.*, at 443. The fact that the *Miranda* presumption overprotects the Fifth Amendment was also left untouched. "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Id.*, at 444. *Dickerson* simply reaffirmed the status quo.

While *Miranda* extended the reach of the Fifth Amendment privilege into the interrogation room, it did not expand the scope of the right. The privilege against self-incrimination is

still a trial right and therefore is only enforced through its exclusionary rule. Certain extreme forms of interrogation can support an action under 42 U. S. C. § 1983, see *infra*, at 27-30, but they are not covered by the Fifth Amendment or the *Miranda* presumption or raised by the facts of this case.

III. An interrogation contrary to the procedural due process voluntariness standard is not sufficient to support a civil rights action.

Interrogations can produce constitutional torts that support an action under 42 U. S. C. § 1983. A brutal interrogation such as the one in the notorious case of *Brown* v. *Mississippi*, 297 U. S. 278, 281-282 (1936) would now produce both civil liability under § 1983 and criminal prosecution. See *Williams* v. *United States*, 341 U. S. 97, 101-102 (1951) (criminal prosecution). But the *Brown* decision itself only involved the exclusion of evidence, not civil liability. In *Brown*, this Court held that due process required the exclusion of a confession obtained through such methods. See 297 U. S., at 286. *Brown* and successive Supreme Court opinions have established that admitting an involuntary confession in a criminal trial violates due process. Like the self-incrimination privilege, this line of cases regulates the admissibility of evidence, and it is thus an aspect of procedural due process. While some interrogation methods that produce involuntary confessions will support a civil rights action, many will not. Procedural due process excludes the fruits of interrogations that involve far less coercion than in *Brown*. See *infra*, at 25-26.

The standard of the procedural due process line of cases was created for a different purpose and is not suited as the standard for civil liability. The proper scope of civil or criminal liability for interrogations is the standard of substantive due process. See *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Sergeant Chavez did not cross the line of a properly defined substantive due process standard, and he is entitled to qualified immunity.

A. Procedural Due Process and Evidence.

Analysis of the due process confession cases begins with an understanding of how this Court uses the term "coercion." Some form of official coercion is a prerequisite to invalidating a confession under due process. See *Colorado* v. *Connelly*, 479 U. S. 157, 164 (1986). However, the scope of what is considered "coercion" is now far greater than just force or the threat of force. The prohibition against "coerced" confessions now also regulates "more subtle forms of psychological persuasion . . . ." *Ibid.* The term "coercion," while constitutionally significant, is best seen as a label for "the crucial element of police overreaching." See *id.*, at 163. While the coercive conduct must be "substantial," see *id.*, at 164, it need not involve "gross abuses . . . ." *Mincey* v. *Arizona*, 437 U. S. 385, 401 (1978).

Coercion cannot be separated from the concept of voluntariness. While coercion is integral to any due process violation, the test for determining a confession's constitutionality under due process is a "voluntariness test." See *Dickerson* v. *United States*, 530 U. S. 428, 434 (2000). The two concepts are so closely related that "prior cases have used the terms 'coerced confession' and 'involuntary confession' interchangeably 'by way of convenient shorthand.' " *Arizona* v. *Fulminante*, 499 U. S. 279, 287, n. 3 (1991) (quoting *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960)). The voluntariness test "examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson*, *supra*, at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973)). The relevant inquiry includes "the totality of all surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth*, at 226. Therefore, when a court labels a confession as "involuntary" or "coerced" it is important to understand that this term is a label that describes a complex inquiry. See *Miller* v. *Fenton*, 474 U. S. 104, 116 (1985). Practices that are not particularly

"coercive" as that term is commonly understood, like inducements, can still render a confession involuntary by overcoming the suspect's will. See *supra*, at 25-26.

It is similarly important to understand how the due process clause regulates confessions. Like the self-incrimination privilege, the *Brown* line regulates confessions through the exclusion of involuntary confessions. Thus the due process question frequently is framed in the context of excluding evidence. See, *e.g.*, *Haynes* v. *Washington*, 373 U. S. 503, 504 (1963) (deciding "whether the *admission* of the petitioner's . . . confession *into evidence against him at trial* constituted a denial of due process of law" (emphasis added)); *Spano* v. *New York*, 360 U. S. 315, 315 (1959) (raising the issue of whether the defendant's "confession was properly admitted under the Fourteenth Amendment"). " 'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.' " *Connelly*, 479 U. S., at 167 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)).

The prohibition against the use of involuntary or coerced confessions that has evolved since *Brown* is a form of procedural due process. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 465 (1994) ("Most, if not all, coerced confession cases are procedural due process cases"). An early due process confession case characterized the prohibition against the admission of involuntary confessions as a matter of procedural due process. See *Chambers* v. *Florida*, 309 U. S. 227, 237 (1940). Prohibiting the taking and subsequent use of involuntary confessions is a matter of fundamental fairness, see, *e.g.*, *Connelly*, 479 U. S., at 167; *Miller*, 474 U. S., at 110; *Michigan* v. *Tucker*, 417 U. S. 433, 441 (1974), which is a component of a procedural due process inquiry. See, *e.g.*, *Medina* v. *California*, 505 U. S. 437, 448 (1992); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320 (1985).

The importance of fair procedures separates procedural from substantive due process. Substantive due process raises a standard "barring certain government actions regardless of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986); see also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Connecticut Dept. of Public Safety* v. *Doe*, No. 01-1231, at 4-7. Since the voluntariness standard guarantees a fair procedure—a trial free from involuntary confessions—this guarantee should not be characterized as part of a substantive due process inquiry that looks beyond whether the action was implemented in a fair manner. Given its basis in the exclusion of evidence and fundamental fairness, the voluntary confession requirement is part of procedural due process.

Procedural due process only requires the state provide the procedure that is due, not any particular result. See *Walters*, 473 U. S., at 321. In criminal cases, this is a fair trial, see *Daniels*, 474 U. S., at 337 (Stevens, J., concurring), a trial with all the procedures required under due process. In the context of the voluntary confession requirement, that is a trial where an involuntary confession is not admitted against the defendant. Therefore, due process is not violated unless an involuntary confession is used to incriminate the defendant at trial.

Coercion alone will not support a procedural due process violation. As the immunity cases demonstrate, coercive interrogation is constitutional when the threat of self-incrimination is removed. See *Kastigar* v. *United States*, 406 U. S. 441, 448-449 (1972) (the government can compel testimony if the speaker is granted immunity). The threat of imprisonment for failing to answer the government's questions is much more coercive than the "more subtle" forms of persuasion proscribed by the Due Process Clause. Cf. *Connelly*, 479 U. S., at 164.[2]

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2. Although the coerced confession test comes from due process rather than the Fifth Amendment, there should be little difference between the level of compulsion that violates procedural due process and that which violates the Fifth Amendment. *Brown* was decided before the incorporation of the Fifth Amendment. The fact that due process is still used to analyze involuntary confessions is a "historical accident." *Cooper* v. *Dupnik*, 924 F. 2d 1520, 1529, n. 17 (CA9 1991), rev'd, *Cooper* v. *Dupnik*, 963 F. 2d 1220 (CA9 1992) (en banc).

Without incrimination, there is no procedural due process violation.

B. Due Process and Policy.

Allowing civil damages for violations of the procedural due process voluntariness standard also threatens public safety. Police interrogation is a public good, not a necessary evil. The *Miranda* decision recognized that confessions are a "proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966). "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth*, 412 U. S., at 225. " 'Questioning suspects is indispensable in law enforcement.' " *Culombe* v. *Connecticut*, 367 U. S. 568, 578 (1961) (opinion of Frankfurter, J.).

It is true that the benefit to society is limited to voluntary confessions. Cf. *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991) ("Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . ."). If the line between voluntary and involuntary confessions were clear, then there would be no additional cost to society for adding civil liability to the remedies for failing to adhere to the voluntariness standard. Unfortunately, the voluntariness test is far from clear.

"The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw . . . ." *Haynes*, 373 U. S., at 515. Dissatisfaction with applying the voluntariness test was a motivation behind *Miranda*'s comparatively bright-line rule. See *Michigan* v. *Mosley*, 423 U. S. 96, 113 (1975) (Brennan, J.,

dissenting); Stone, The *Miranda* Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99, 102-104. One reason for the *Miranda* rule is that it provides at least a "brighter-line" rule than the due process standard. See *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993).

A myriad of objective and subjective factors governs the voluntariness inquiry. "Those potential circumstances include not only the crucial element of police coercion, the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, and mental health." *Id.*, at 693 (citations omitted). This "exhaustive totality-of-circumstances approach," see *id.*, at 694, is further complicated by the elusive concept of voluntariness.

> "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." Bator & Vorenberg, Arrest, Detention, Interrogation, and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Colum. L. Rev. 62, 72-73 (1966).

Therefore, the due process standard has been rightly criticized as giving too little guidance to the police. See Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 869 (1991). The inherent subjectivity of determining when the suspect's "will was overborne," *Schneckloth*, 412 U. S., at 226, further complicates the inquiry. Determining one's will is inherently subjective. Thus factors such as the suspect's education, intelligence, or adaptation to the stress of incarceration influence the admissibility of the confession under the

voluntariness standard. See *Fulminante*, 499 U. S., at 286, n. 2. This means that interrogation that is acceptable in some contexts can render the confession inadmissible due to certain characteristics of the suspect, which further complicates an already muddled issue.

This Court has recognized the considerable criticism of the voluntariness standard. See *Miller*, 474 U. S., at 116, n. 4. The complexity of this standard was a substantial reason to not apply the rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda*. Precluding *Miranda* claims from federal habeas corpus would not lessen the workload of the federal courts, because the *Miranda* inquiry would be replaced by the considerably more complex voluntariness issue. See *Withrow*, 507 U. S., at 693-694.

The threat of civil litigation can deter public employees from exercising their duties properly. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982). While the qualified immunity defense is predicated upon providing government officials with an objective standard of liability, see *Wyatt* v. *Cole*, 504 U. S. 158, 166 (1992), the vagueness and subjectivity of the voluntariness standard threatens to overwhelm this defense.

Many confessions can be deemed involuntary yet not the product of particularly "coercive" interrogation, as that term is commonly understood. Promises by the interrogator can lead to a confession being declared involuntary. Thus courts have struck down confessions made in response to promises of "nonprosecution, the dropping of some charges, medical treatment, or a certain reduction in the punishment defendant may receive . . . ." See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.2(c), pp. 453-454 (2d ed. 1999) (footnotes omitted). For example, one court struck down a confession induced by a promise to help the defendant get counseling after confessing. See *People* v. *Shaw*, 180 Ill. App. 3d 1091, 1094-1096, 536 N. E. 2d 849, 851-852 (1989). This Court has struck down a confession induced by a promise from a police informant to protect the defendant from

his fellow prisoners, an admittedly "close question." See *Fulminante*, 499 U. S., at 287. It has also struck down a confession induced by a promise to a suspect in custody that he would be allowed to call his wife after confessing. See *Haynes*, 373 U. S., at 514. These cases illustrate that a confession can be involuntary even if there is little actual coercion or official misconduct. Civil liability should rest on sterner stuff.

The present case highlights the problems with the voluntariness standard. *Mincey* v. *Arizona*, 437 U. S. 385 (1978), the closest case, is distinguishable on several grounds. Mincey repeatedly asked for counsel, and the interrogation lasted continuously from 8:00 p.m. until midnight. The interview of Martinez took only around 45 minutes. See Pet. for Cert. 3. Martinez never asked for counsel, but only indicated twice that he would not answer any questions until he was treated. See *supra*, at 2.

The most important difference is that Martinez was never "compelled in any criminal case to be a witness against himself." Cf. U. S. Const., Amdt. 5. While Mincey's interview was used to impeach his testimony at his criminal trial, see 437 U. S., at 397, Martinez has not been prosecuted. See *supra*, at 2. Sergeant Chavez thought that Martinez was going to die. See Pet. for Cert. 3. If he had been right, then the interview would have been the only way to get Martinez's side of the story. The only ones who might have been threatened by the interview were the officers involved in the shooting. While Martinez lived to tell his story, this does not change the nature of the interview. *Miranda* would have prevented Martinez's statements from being used against him, but it would not have prevented any of his statements from being used for or against Officers Peña or Salinas in subsequent disciplinary, civil, or criminal proceedings. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317 (1976) (no Fifth Amendment violation without criminal prosecution). Allowing this comparatively benign interrogation to support civil liability threatens to straightjacket the police in the interrogation room.

The voluntariness standard in this case provided weak cover for finding civil liability for questioning contrary to *Miranda*. The vagueness of the procedural due process standard means that this will be repeated unless courts are foreclosed from basing civil liability upon questioning contrary to this procedural due process standard. While grossly improper interrogation can support civil liability, a more concrete standard and a greater level of harm are needed.

C. Alternatives.

Something more serious than a violation of the procedural due process voluntariness standard is needed to support civil liability for an interrogation.

> "Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails." *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230, 1244 (CA7 1990), rev'd on other grounds, *Buckley* v. *Fitzsimmons*, 509 U. S. 259 (1993).

This passage from the Seventh Circuit's opinion is taken in the context of allowing prosecutors absolute immunity for Fifth Amendment or *Miranda* violations because they involve trial rights. See 919 F. 2d, at 1244. It also asserts that coercive interrogation would only be afforded qualified immunity. See *ibid*. However, not every act of "coercion" involves pretrial harm to the suspect. Civil liability should be limited to gross coercions like those listed in the *Buckley* passage, but not the more subtle forms of coercion that also fall within the procedural due process standard.

Interrogators should be held liable under 42 U. S. C. § 1983 for violence, the deprivation of food, water, sleep, or other life necessities or threats to commit such wrongs against the suspect. This approach has several related advantages over the

voluntariness standard. First, it limits liability to clearly identifiable harms that are complete without regard to the admissibility of evidence. It also provides an objective standard that is much easier to understand than the murky voluntariness test. Finally, under this standard there is no real risk of deterring worthwhile, legal interrogation. Violence and deprivation, whether real or threatened, have no place in the interrogation room. More subtle forms of psychological pressure can produce constitutionally valid confessions in the right context. See *supra*, at 24-25.

This Court has once invoked due process to regulate interrogation through criminal sanctions on the interrogating officers. In *Williams* v. *United States*, *supra*, the Court held that officers who beat a confession out of a suspect could be prosecuted for violating the suspect's due process rights under the predecessor of 18 U. S. C. § 242. See 341 U. S., at 101-102. However, not every interrogation that resulted in an involuntary confession would necessarily lead to criminal sanction. "Some day the application of [18 U. S. C. § 242] to less obvious methods of coercion may be presented and doubts to the adequacy of the standard of guilt may be presented."[3] *Ibid.* In *Williams*, the suspects' interrogation consisted of brutal beatings and other forms of physical abuse. *Id.*, at 98-99. "Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights which every citizen enjoys." *Id.*, at 101-102 (emphasis added).

This distinction has constitutional significance. Force, the threat of force, or the deprivation of food, water, or sleep during interrogation violates substantive due process. Unlike the procedural due process prohibition against the use of coerced

3. The standard of clarity of pre-existing law for finding civil liability under 42 U. S. C. § 1983 is the same as for finding criminal liability under 18 U. S. C. § 242. *United States* v. *Lanier*, 520 U. S. 259, 270-271 (1997).

confessions, this right is violated without regard to whether the suspect is in fact incriminated. The violation is complete with the beatings.

The Seventh Circuit's decision in *Buckley* has been characterized as a substantive due process holding. See Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Penn. L. Rev. 417, 451-452 (1994). This Court has recognized that the use of force by government officials that "shocks the conscience" violates substantive due process. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998). Like any standard, this test can be misapplied. See Klein, *supra*, at 454; Gardner, Section 1983 Actions Under *Miranda*: A Critical View of the Right to Avoid Interrogation, 30 Am. Crim. L. Rev. 1277, 1307 (1993) (criticizing the substantive due process holding of *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1237 (CA9 1992) (en banc)). A properly calibrated standard as suggested by the Seventh Circuit's holding in *Buckley* provides adequate protection and an appropriately concrete standard.

The *Buckley* standard is also consistent with *Lewis*. The *Lewis* Court noted that the intentional infliction of harm is much more likely to shock the conscience than negligent or reckless harm. See 523 U. S., at 849. An interrogation practice that violates substantive due process will involve an intentional violation of the right, like a beating. Therefore there should be no difficulty in finding the conduct shocking to the court's conscience under the appropriate standard.

While other constitutional standards are available, they are wanting. This Court has left open the question of whether the Fourth Amendment's prohibition of unreasonable seizures applies to detainees after the arrest has been completed. See *Graham* v. *Connor*, 490 U. S. 386, 395, n. 10 (1989). Extending the Fourth Amendment to pretrial detainees raises difficult questions, see *United States* v. *Cobb*, 905 F. 2d 784, 788, n. 7 (CA4 1990), that need not be answered in this case. *Graham* also mentioned that pretrial detainees had a due process right to

be free "from the use of excessive force that amounts to punishment." See 490 U. S., at 395, n. 10 (citing *Bell* v. *Wolfish*, 441 U. S. 520, 535-539 (1979)). Interrogation and prisoner rights are separate issues that should not be mixed. The substantive due process standard of *Buckley* does not need to be supplemented by *Bell*'s foreign standard.

The fact that a federal appellate court has allowed a § 1983 action for Sergeant Chavez's brief, comparatively benign questioning demonstrates the need to clarify the law. This Court should limit § 1983 liability for interrogation to the gross violation that leads to real harm other than the suspect's incriminating statement. Limiting money damages to physical harm, threats of harm, or substantial deprivations will afford suspects appropriate compensation, while limiting unwarranted assaults on police practices.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

September, 2002

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(6)

No. 01-1444

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IN THE SUPREME COURT OF THE UNITED STATES

BEN CHAVEZ, *Petitioner,*

v.

OLIVERIO MARTINEZ, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL F OR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, AS AMICUS CURIAE IN SUPPORT OF PETITIONER, BEN CHAVEZ

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
JO GRAVES
Senior Assistant Attorney General
STAN CROSS
Supervising Deputy Attorney General
LEE E. SEALE
Deputy Attorney General
PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-2785
Fax: (916) 324-2960
Counsel for Amicus State of California

19 pp

QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. § 1983 alleging that his interrogation of respondent was unduly coercive, in violation of the Fifth and Fourteenth Amendments, where no statement made by respondent has ever been used against him in a criminal case.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1444

BEN CHAVEZ, *Petitioner,*

v.

OLIVERIO MARTINEZ, *Respondent.*

INTEREST OF AMICUS CURIAE

Relying primarily on its own analytically unsound decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit Court of Appeals has concluded that petitioner Sergeant Chavez violated both the Fifth Amendment privilege against compelled self-incrimination and Fourteenth Amendment Due Process Clause by subjecting respondent Martinez to "coercive, custodial interrogation while he received treatment for life-threatening gunshot wounds." *Martinez v. Oxnard*, 270 F.3d 852, 856 (9th Cir. 2001). In denying Sergeant Chavez's defense of qualified immunity, the Ninth Circuit has significantly expanded the potential for lawsuits against California's sworn peace officers. The Ninth Circuit appears to be the only federal circuit to have approved civil liability for the type of conduct involved in this case, and its conclusion contradicts numerous pronouncements from this Court.

The prospect of broad personal liability for engaging in investigative questioning will inevitably have a chilling effect upon peace officers as they investigate criminal cases. Accordingly, the State of California has a solemn obligation to seek its correction.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in denying petitioner Sergeant Chavez's defense of qualified immunity. The law has never been clearly established that it is possible for a peace officer in the field to violate a person's Fifth Amendment privilege against compelled self-incrimination. Indeed, contrary to the view of the Ninth Circuit, the Fifth Amendment privilege, as defined in *Miranda v. Arizona*, 384 U.S. 436 (1966), represents a trial right governing the admissibility of evidence and therefore cannot be a basis for suit under 42 U.S.C. § 1983. To be sure, police officers may be held liable under that section for their conduct in the field if it is found to "shock the conscience" under the substantive component of the Fourteenth Amendment's Due Process Clause. However, the Ninth Circuit failed to apply this standard in its analysis of Martinez's claims. Therefore, the Ninth Circuit's ruling should be reversed.

ARGUMENT

THE NINTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY FOR PETITIONER SERGEANT CHAVEZ BECAUSE THE LAW HAS NEVER BEEN CLEARLY ESTABLISHED THAT MERE COERCIVE QUESTIONING VIOLATES EITHER THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION OR THE SUBSTANTIVE COMPONENT OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

A. Introduction

By holding that Sergeant Chavez violated both the Fifth and Fourteenth Amendments by subjecting Martinez to coercive questioning, the Ninth Circuit conflated the distinct nature of each constitutional provision.

The Fifth Amendment privilege against compelled self-incrimination is a trial right governing the admission of evidence. Martinez cannot claim to have suffered a violation of this provision because he was never brought to trial and his statements were never used against him. Indeed, contrary to the Ninth Circuit's conclusion, police conduct in the field can never amount to a violation of this provision.

The substantive component of the Fourteenth Amendment's Due Process Clause permits recovery under 42 U.S.C. § 1983 only when official conduct is found to "shock the conscience." The Ninth Circuit erred by failing to apply this standard, concluding instead that "coercive" conduct was sufficient for a violation of this provision. The Ninth Circuit

has thereby significantly expanded the potential for lawsuits against peace officers.

Further compounding its error, the Ninth Circuit, in denying Sergeant Chavez's defense of qualified immunity, also held that its erroneous view of these provisions represents "clearly established law" of which any "reasonable" officer would be aware. Qualified immunity exists to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). The Ninth Circuit, however, has permitted interference with the investigative efforts of peace officers by significantly broadening the scope of potential lawsuits against them.

B. Respondent Martinez's Fifth Amendment Privilege Against Compelled Self-Incrimination Was Not Violated Because He Was Never Brought To Trial And His Statements Were Never Used Against Him

In *Martinez v. Oxnard*, the Ninth Circuit concluded that respondent Martinez's Fifth Amendment privilege against compelled self-incrimination was violated even though his statements were not admitted against him at trial. *Martinez*, 270 F.3d at 857. The Ninth Circuit is mistaken.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[1/] U.S. Const. amend. V. Respondent Martinez was not compelled in a criminal case to be a witness against himself.

---

1. In *Malloy v. Hogan*, 378 U.S. 1, 84 (1964), this Court held that the Fifth Amendment privilege against compelled self-incrimination is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the states. *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

He was not charged with a crime and his statements were not introduced against him in court. *Martinez v. Oxnard*, 270 F.3d at 857. Therefore, his Fifth Amendment privilege against compelled self-incrimination was not violated.

1. The Decisions Of This Court Have Made It Clear That *Miranda* Is A Trial Right Governing The Admissibility Of Evidence

Contrary to the Ninth Circuit's view, this Court has made it clear that the Fifth Amendment privilege against compelled self-incrimination is a trial right that governs the admissibility of evidence. Non-compliance with *Miranda* by police officers does not violate a person's Fifth Amendment privilege. Rather, a transgression of a person's Fifth Amendment privilege only occurs when a statement obtained in violation of *Miranda* is admitted into evidence.

The *Miranda* decision itself clearly indicates that it deals with the admissibility of evidence. "[W]e deal with the *admissibility* of statements obtained from an individual who is subjected to custodial interrogation . . . ." *Miranda*, 384 U.S. at 439 (emphasis added). "Our holding . . . briefly stated . . . is this: the prosecution may not *use* statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444 (emphasis added). "The constitutional issue we decide in each of these cases is the *admissibility* of statements obtained from a defendant while in custody . . . ." *Id.* at 445 (emphasis added). "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the *admissibility* of any statement made by a defendant." *Id.* at 476 (emphasis added).

Since *Miranda*, this Court has repeatedly affirmed that its holding dealt with the admissibility of evidence:

> In the years since the decision in *Miranda*, we have frequently reaffirmed the cental principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses *cannot be introduced into evidence* to establish his guilt.

Berkemer v. McCarty, 468 U.S. 420, 429 (1984) (emphasis added). "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be *excluded from evidence at trial* in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985) (emphasis added).

Recently, this Court has reaffirmed that *Miranda* is a rule controlling the admissibility of evidence: "We therefore hold that *Miranda* and its progeny in this Court govern the *admissibility* of statements made during custodial interrogation in both state and federal courts." *Dickerson*, 530 U.S. at 431 (emphasis added).

Stated another way, this Court has explained that *Miranda* provides a trial right: "...[I]n protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial right*.'" *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (original emphasis). "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. Although conduct by law enforcement officers prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added).

Thus, this Court has made it clear that *Miranda* is a trial right governing the admissibility of evidence. Rather than creating an absolute requirement for police conduct in the field,

the *Miranda* decision creates a conditional requirement for the admissibility of evidence at trial. *See United States v. Balsys*, 524 U.S. 666, 692 (1998) [unlike the Fourth Amendment, which is violated at the moment of illicit intrusion, the Fifth Amendment presents a "conditional protection"]. Police conduct, alone, cannot violate a person's Fifth Amendment privilege against compelled self-incrimination. Therefore, Sergeant Chavez cannot be personally liable under § 1983 for violating respondent Martinez's rights under the Fifth Amendment for conduct that occurred in the field.

2. The Decisions Of Other Circuits Have Correctly Concluded That A Peace Officer's Non-Compliance With *Miranda* Does Not Violate A Suspect's Fifth Amendment Privilege Against Compelled Self-Incrimination And Therefore Cannot Give Rise To A Claim Under 42 U.S.C. § 1983

Other circuits considering the issue have concluded that peace officers cannot be sued under § 1983 for violating a suspect's Fifth Amendment privilege against compelled self-incrimination by failing to comply with *Miranda*. *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995) [failure to provide *Miranda* warnings does not result in a § 1983 claim if no statements were obtained]; *Deshawn E. v. Safir*, 156 F.3d 340, 346 (2nd Cir. 1998) ["The remedy for a violation of the right against self-incrimination is the exclusion from evidence of any ensuing self-incriminating statements and not a § 1983 action" (internal quotation marks omitted)]; *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994) ["The dissenting judges in (*Cooper v. Dupnik*) presented a persuasive argument that the Fifth Amendment privilege against self-incrimination is not violated until evidence is admitted in a criminal case"];

Riley v. Dorton, 115 F.3d 1159, 1164-65 (4th Cir. 1997) [no § 1983 action is available where no statement was admitted against the claimant]; *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (en banc) ["The remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action"]; *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987) [officers' failure to provide *Miranda* warnings did not deprive suspect of her constitutional rights since no statements obtained from her during custodial interrogation were used against her during trial]; *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976) ["The *Miranda* decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence"]; *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) [failing to follow *Miranda* procedures triggers the exclusion of evidence, but does not permit a cause of action to lie for money damages under § 1983].

Contrary to the decisions of the First, Second, Third, Fourth, Eighth, Tenth and Eleventh Circuits, the Ninth Circuit has held that a person's Fifth Amendment privilege against compelled self-incrimination can be violated by non-compliance with *Miranda*, even though that person's statement is not admitted against him at trial. *See Cooper*, 963 F.2d at 1237 ["It is irrelevant that (the defendant's) statements were never introduced against him at trial"]. In *Martinez v. Oxnard*, the Ninth Circuit relied on its own flawed reasoning in *Cooper* to reach the same conclusion again. *See Martinez*, 270 F.3d at 857, citing *Cooper*, 963 F.2d at 1237. The Ninth Circuit stands alone in its error.

3. Since The Ninth Circuit's Erroneous View Of The Scope Of The Fifth Amendment Privilege Is Not "Clearly Established Law," Its Denial Of Qualified Immunity For Sergeant Chavez Was Improper

Qualified immunity protects public officials from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 806. Therefore, a person suing a public official under § 1983 must show that a reasonable person would have known that clearly established law prohibited such conduct.

In this case, the Ninth Circuit's erroneous conclusion regarding the scope of a person's Fifth Amendment privilege was not "clearly established." As stated above, the Ninth Circuit's conclusion contradicts Supreme Court authority. Furthermore, that such a view is not clearly established is demonstrated by the fact that every other Circuit considering the issue has reached a contrary conclusion. *Giuffre*, 31 F.3d at 1256.

Indeed, as the Fourth Circuit has noted, the fact that other judges dissented from the majority's conclusion in an earlier Ninth Circuit case considering the same issue demonstrates that the Ninth Circuit's view is not "clearly established":

> The dissents in *Cooper*, however, make persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case. The disagreement between the judges of the Ninth Circuit as to the correct interpretation of the relevant constitutional principles indicates that even at the time of the *Cooper* decision, the law was not clearly established.

Wiley v. Doory, 14 F.3d 993, 998 (4th Cir. 1994) (citations omitted).

It cannot be said that a reasonable officer would have understood the Ninth Circuit's erroneous conclusion regarding the scope of the Fifth Amendment privilege to be "clearly established" law. In the absence of settled law on the issue, the Ninth Circuit's conclusion that Sergeant Chavez was not entitled to qualified immunity was improper.

C. Police Conduct In The Field Must "Shock The Conscience" To Violate The Substantive Component Of The Fourteenth Amendment's Due Process Clause, A Standard That The Ninth Circuit Did Not Apply

It is possible for police to engage in conduct in the field that would render a resulting statement involuntary and therefore inadmissible at trial under the Fourteenth Amendment Due Process Clause. For example, coercion through the use of physical force, psychological mistreatment, threats, or official inducements, such as promises of leniency, benefits or immunity, could render a resulting statement involuntary and therefore inadmissible at trial. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Shotwell Mfg. v. United States*, 371 U.S. 341, 348 (1963); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997).

However, contrary to the Ninth Circuit's view, not all coercive police conduct violates a person's civil rights. A civil rights suit under 42 U.S.C. § 1983 requires a higher level of misconduct than that resulting in an evidentiary ruling suppressing evidence. Stated another way, police conduct may well be sufficiently coercive to render a suspect's statement inadmissible against him at his criminal trial, yet still be insufficiently coercive to constitute a violation of the

Constitution for which the suspect can sue civilly and receive monetary damages.

The substantive component of the Fourteenth Amendment's Due Process Clause requires that governmental conduct must "shock the conscience" before it rises to the level of a constitutional violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48 (1998); *Rochin v. California*, 342 U.S. 165, 172 (1952). Thus, in *Cooper v. Dupnik*, the Ninth Circuit properly upheld the plaintiff's § 1983 civil rights claim under the Fourteenth Amendment's Due Process Clause because the majority found the police conduct to be outrageous and shocking. *Cooper*, 963 F.2d at 1244.

Unlike the Fifth Amendment privilege, the Due Process Clause may be violated by police officers in the field. As this Court has stated, the constitutional violation is "complete when the wrongful action is taken." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

In the case at bar, on the other hand, the Ninth Circuit never discussed the "shock the conscience" standard. Rather, the court erroneously concluded that mere "coercive conduct" sufficed. *Martinez*, 270 F.3d at 857. Therefore, Sergeant Chavez's conduct was never assessed against the proper standard.

Police conduct must shock the conscience to be actionable under the substantive component of the Fourteenth Amendment's Due Process Clause. The Ninth Circuit failed to analyze Sergeant Chavez's conduct in light of the proper standard under that provision. Since a reasonable officer would not have recognized as "clearly established law" the Ninth Circuit's misapplication of the standard for police conduct under the Fourteenth Amendment's Due Process Clause, the Ninth Circuit's denial of qualified immunity for Sergeant Chavez was improper.

CONCLUSION

This Court should reverse the Ninth Circuit's ruling that Sergeant Chavez violated respondent Martinez's Fifth Amendment privilege against compelled self-incrimination. Police officers cannot violate a person's Fifth Amendment privilege during interrogation. The Ninth Circuit's denial of qualified immunity for Sergeant Chavez should also be reversed.

Furthermore, respondent Martinez's coercive interrogation claim should have been analyzed under the substantive component of the Fourteenth Amendment's Due Process Clause. Under that clause, the proper standard is whether police conduct shocks the conscience. The Ninth Circuit's ruling that mere coercive interrogation met that standard should likewise be reversed.

Dated: September 4, 2002

Respectfully submitted,

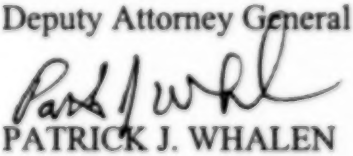
BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

STAN CROSS
Supervising Deputy Attorney General

LEE E. SEALE
Deputy Attorney General



PATRICK J. WHALEN
Deputy Attorney General
Counsel of Record
Counsel for Amicus State of California

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Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR AMICUS CURIAE THE CITY OF ESCONDIDO IN SUPPORT OF PETITIONER

JEFFREY R. EPP, City Attorney
MARK A. WAGGONER,*
Asst. City Attorney
OFFICE OF THE CITY ATTORNEY
201 N. Broadway
Escondido, California 92025
(760) 839-4608 Tel.

RICHARD J. SCHNEIDER
DALEY & HEFT
462 Stevens Avenue, Suite 201
Solana Beach, California 92075
(858) 755-5666 Tel.

Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICUS CURIAE[1]

The City of Escondido is a municipal corporation employing a police department. The City finds that imposition of undue civil liability on municipalities has a negative effect on the ability of municipalities to investigate crime, retain qualified police officers, and provide for public safety.

Aside from its general interest in issues of civil liability affecting police officers, the City is a defendant in a civil rights suit alleging, among other things, the violation of Fifth Amendment rights as a result of custodial interrogations, even though the incriminating statements were never introduced at a trial.

SUMMARY OF ARGUMENT

In the case before the Court, the Ninth Circuit Court of Appeals has held that even though Oliverio Martinez' statements were not used against him in a criminal proceeding, the custodial interrogation violated his Fifth Amendment rights and gave rise to a civil claim under 42 U.S.C. Section 1983. (*Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001).) To reach this conclusion, the Ninth Circuit has relied on its own controversial decision in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (a

[1] The City of Escondido submits this amicus curiae brief pursuant to Supreme Court Rule 37.4. No counsel for a party authored this brief in whole or in part, and no person other than the amicus made a monetary contribution to the preparation or submission of the brief.

Fifth Amendment violation is complete at the time of the offending behavior). What is notable about the *Martinez* decision is its ready acknowledgement that its conclusion contradicts the Supreme Court's pronouncement in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), that the Fifth Amendment is a trial right that can only be violated at trial. *Martinez* overcomes this contradiction by describing the Supreme Court's pronouncement as "dicta."

Other circuits have soundly criticized the Ninth Circuit's holding in *Cooper* that a Fifth Amendment violation is complete at the station house. The well-reasoned opinions of the other circuits all point to one thing, which *Martinez* chooses to disregard: The Supreme Court has very emphatically stated, in opinions pre-dating and following *Verdugo-Urquidez*, that the Fifth Amendment right against self-incrimination is a fundamental *trial* right (*Withrow v. Williams*, 507 U.S. 680, 691 (1993)), which "applies only when the accused is compelled to make a testimonial communication that is incriminating." (*Fisher v. United States*, 425 U.S. 391, 408 (1976).)

There is an uneven split among the circuits regarding whether the Fifth Amendment right against self-incrimination is complete at the moment of coercion. The Ninth Circuit stands alone on this issue, and its position squarely contradicts this Court's decisions regarding the nature of the Fifth Amendment right against self-incrimination. Furthermore, the holding imposes a chilling effect on law enforcement's ability to discharge its duties with appropriate zeal.

ARGUMENT

I. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION CAN ONLY BE VIOLATED AT TRIAL

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Verdugo-Urquidez,* the Court explained that the Fifth Amendment can be violated by the introduction *at trial* of an illegally-obtained statement: "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." (494 U.S. at 264.)

Most circuits considering the Fifth Amendment right against self-incrimination have strictly adhered to the language of the Fifth Amendment and this Court's pronouncement that it is a trial right. In *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987), the Eighth Circuit Court of Appeals held that the Fifth Amendment right against self-incrimination is not violated where statements obtained during custodial interrogations are not used against the declarant during trial. Relying on *Withrow* and *Fisher*, the Fourth Circuit has held that the Fifth Amendment right against self-incrimination is not violated unless the statement is used against the suspect at trial. (*Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997).) Although the Sixth Circuit has not specifically addressed the issue, the District Court in *Grooms v. Marshall*, 142 F.Supp.2d 927, 937 (S.D. Ohio 2001) recently held that indicted suspects who are never tried cannot raise a Section 1983 claim for violation of their Fifth Amendment right based upon coercive custodial

interrogations because the Fifth Amendment is a trial right.

The well-reasoned approach of the Fourth and Eight Circuits is echoed in the dissenting opinion of Justice Brunetti in *Cooper*: it is the use of the coerced statement at trial that constitutes a Fifth Amendment violation. (*Cooper*, 963 F.2d at 1254). Justice Brunetti's dissent is cited with approval by other circuits as presenting "persuasive arguments" regarding when the right against self-incrimination is violated. (*See, e.g., Wiley v. Doory*, 14 F.3d 993, 998 (4th Cir. 1994); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994) (expressing approval for the dissenters' position in *Cooper*); *Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999) (agreeing with the dissent in *Cooper* that the majority "has departed from the clear requirements for Section 1983 actions").)

The Second Circuit has held that while the Fifth Amendment is not violated at the moment of coercion, it is violated if the self-incriminating statement is used in a grand jury proceeding. (*Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994).) Thus, under the Second Circuit's interpretation, the "use or derivative use of a compelled statement at *any* criminal proceeding against the declarant violates that person's Fifth Amendment rights." (*Id.*) Although the Seventh Circuit has not specified at what point in a criminal prosecution the Fifth Amendment right is violated, it has generally held that the Fifth Amendment does not forbid the forcible extraction of information, but only the use of that information as evidence in a "criminal case". (*Mahoney v. Kesery*, 976 F.2d 1054, 1062 (7th Cir. 1992), quoting *Wilkens v. May*, 872 F.2d 190, 194 (7th Cir. 1989).)

Among the circuits, the Ninth Circuit stands alone in holding that the Fifth Amendment right against self-incrimination is violated at the station house. Citing only its own decision in *Cooper*, the Ninth Circuit in *Martinez* has stated that the purpose of the Fifth Amendment is "to prevent coercive interrogation practices that are destructive of human dignity." (*Martinez*, 270 F.3d at 857.) Ascribing such broad purposes to the Fifth Amendment, the Ninth Circuit has held that the Fifth Amendment's protection extends "not just over the courthouse, but also over the jailhouse, the police station, and other settings in which law enforcement authority was invoked." (*Id.*)

It is Justice Brunetti's dissent in *Cooper*, and the holdings of the Eighth and Fourth Circuits, and the District Court in Ohio, that follow Supreme Court precedents. Well before *Verdugo-Urquidez*, the Supreme Court stated the Fifth Amendment's "sole concern is to afford protection against being forced to give testimony leading to the infliction of penalties affixed . . . to criminal acts." (*Kastigar v. United States*, 406 U.S. 441, 453 (1972).) In *Ullman v. United States*, 350 U.S. 422, 438-439 (1956), the Supreme Court stated that the concern of the Fifth Amendment is to prevent the danger of being forced to give testimony leading to the infliction of penalties. Therefore, the pronouncement in *Verdugo-Urquidez* is based on long-standing Supreme Court holdings that the Fifth Amendment safeguards against testimonial self-incrimination in a criminal trial that leads to the imposition of penalties.

As *Verdugo-Urquidez* recognized, pre-trial police conduct may *ultimately* impair a suspect's Fifth Amendment right, but a violation of that right occurs only if the statement is admitted in trial against the accused. Even though

the right against self-incrimination extends to the station house, and police conduct at that point can make the statement involuntary, the Fifth Amendment cannot be violated at the station house because the purpose of the Fifth Amendment is to create fairness ***at trial***. (*See, e.g., Bram v. United States*, 168 U.S. 532 (1897) (Fifth Amendment bars the introduction *at trial* of involuntary confessions made during custodial interrogations); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (*Miranda* guards against the use of unreliable statements *at trial*); *Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973) (basis of suppression decision is to protect the fairness of the *trial* itself).) In *Withrow*, the Supreme Court relied on *Verdugo-Urquidez* in holding that the Fifth Amendment safeguards against the use of unreliable statements *at trial*. (*Id.* at 691-692.) Very recently, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that *Miranda v. Arizona*, 384 U.S. 436 (1966), is a constitutional decision that governs the admissibility of statements made during custodial interrogation in both state and federal courts. (530 U.S. at 432.) In *Miranda*, the Court's concern was that reliance on the traditional totality of circumstances test risked the introduction of an involuntary confession *in the prosecutor's case in chief*. (384 U.S. at 457.)

Moreover, the introduction of an involuntary confession cannot form the basis of a Section 1983 claim against the police officer because, as this Court has held, the procedural mistake is a *trial* error. (*Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).) A trial judge's mistake in admitting a coerced statement does not expose a police officer to liability. (*Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir. 1972).) The Ninth Circuit's holding in *Martinez* renders these precedents meaningless, since regardless of whether

the involuntary statement is entered into evidence at trial, the police officers face civil liability.

Thus, the Ninth Circuit's position that a Fifth Amendment violation is complete at the moment coercive police conduct occurs is indefensible. Both the text of the Fifth Amendment, and long-standing Supreme Court decisions, establish that the Fifth Amendment is a trial right, which can only be violated when the incriminating statement is introduced at trial, in the prosecutor's case-in-chief, against the declarant.

II. THE NINTH CIRCUIT'S POSITION HAS A HARMFUL IMPACT ON LAW ENFORCEMENT

Relying solely on *Cooper*, *Martinez* holds that a Section 1983 claim may be asserted based on the police officer's conduct during a custodial interrogation. The dissent in *Cooper* persuasively argued that the remedy for obtaining a coerced statement is the suppression of the statement at trial, not the subjection of the police officer to civil liability under Section 1983. (*Cooper*, 963 F.2d at 1253.) Similarly, the Eleventh Circuit in *Jones*, *supra*, held that the appropriate remedy for an involuntary confession is the exclusion of the confession from evidence, not a civil suit against the police officer. (*Jones*, 174 F.3d at 1290-1291.)

Indeed, this Court has recognized that the suppression of statements obtained through willful or negligent police conduct will deter further violations of the Fifth Amendment: "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an

accused." (*Michigan v. Tucker*, 417 U.S. 433, 447 (1974).) The imposition of civil liability on those same police officers does not have a deterrence effect so much as it imposes a chilling effect on law enforcement's ability to conduct investigations.

The Fifth Amendment results in the suppression of a statement not only where the officer commits outrageous conduct, but also where, depending on the circumstances, the statement is "obtained by any direct or implied promises, however slight," any subtle psychological pressure, or even "so mild a whip as the refusal . . . to allow a suspect to call his wife until he confessed." (*Malloy v. Hogan*, 378 U.S. 1, 7 (1964).) Courts have held that a promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect. (*United States v. Leon-Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977).) Other courts have held that an agent's threat to communicate the suspect's failure to cooperate to the prosecutor renders the confession involuntary. (*United States v. Tingle*, 658 F.2d 1332, 1335 fn. 5 (9th Cir. 1981).)

Whether an interrogation fell within the ambit of impermissible conduct under the law is usually determined at a suppression hearing. A judge aided by legal training, trial experience, and legal research, makes a determination in light of the totality of the circumstances whether the suspect's statement was the result of a free will, or whether it was the by-product of a will overborne. (*Withrow v. Williams*, 507 U.S. at 693-694.) Unlike the judge at a suppression hearing, police officers in the field

are "supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance", and must "make split-second judgments in circumstances that are tense, uncertain and rapidly evolving." (*Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (Internal citations omitted).) The officer's decisions are made without the benefit of a legal education, research memoranda, and the time needed to consider the totality of circumstances.

Under *Martinez* and *Cooper*, the police officer faces exposure to civil liability, punitive damages and attorneys fees if he so much as utters a set of words that may later be deemed an improper promise of leniency versus a recitation of the natural consequences of the suspect's conduct. The specter of personal liability can only interfere with and chill the police officer's discharge of his duties in investigating crimes and locating culprits.

This is not to say that there should be no civil liability for violation of a person's constitutional rights in the station house. In cases of outrageous police conduct that "shocks the conscience", a police officer may face civil or even criminal liability. There is a public policy appeal to the idea that outrageous conduct shocking the conscience deserves strong deterrence in the form of exposure to civil liability, since shocking conduct is easily discerned, and a certain amount of willfulness is required to continue on that course. The same deterrence argument does not apply to lesser types of presumptively coercive conduct.

It is important to note that the police conduct at issue in *Cooper* was indeed so shocking and outrageous that there was no need for the Ninth Circuit to break new

ground by holding that the Fifth Amendment violation was complete upon the occurrence of the police conduct. In *Cooper*, the police officers admitted that they deliberately planned and carried out a coercive interrogation, knowing it was against the law, and knowing that it would be suppressed from the prosecution's case in chief. Even the *Cooper* court acknowledged that it was not dealing with "a product of police interrogation that is just technically involuntary, or presumptively involuntary," but with actively and intentionally compelled and coerced statements. (963 F.2d at 1243.)

Martinez applies the *Cooper* holding, which arose from a purposeful, calculated, pre-determined disregard of a suspect's rights, to all cases in which, under the totality of circumstances, the police conduct is later deemed to have violated the right against self-incrimination because it implied a promise or contained a veiled threat. The impact of the *Martinez* holding on law enforcement can only be described as harmful.

CONCLUSION

The judgment of the Court of Appeals should be reversed because it deliberately ignores the text of the Fifth Amendment, Supreme Court precedent, and because it imposes a harmful chilling effect on the investigative work of law enforcement.

Respectfully submitted,

JEFFREY R. EPP, City Attorney
MARK A. WAGGONER,*
Asst. City Attorney
OFFICE OF THE CITY ATTORNEY
201 N. Broadway
Escondido, California 92025
(760) 839-4608 Tel.

RICHARD J. SCHNEIDER
DALEY & HEFT
462 Stevens Avenue, Suite 201
Solana Beach, California 92075
(858) 755-5666 Tel.

Counsel for Amicus Curiae

* *Counsel of Record*

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ON WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, THE NATIONAL POLICE ACCOUNTABILITY PROJECT AND THE NATIONAL BLACK POLICE ASSOCIATION, INC., SUPPORTING RESPONDENT

SUSAN R. KLEIN
Counsel of Record
727 E. DEAN KEETON ST.
AUSTIN, TX 78705
(512) 232-1324

MICHAEL AVERY
SUFFOLK LAW SCHOOL
120 TREMONT ST.
BOSTON, MA 02108
(617) 573-8551

Counsel for Amici Curiae

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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INTEREST OF AMICI CURIAE[1]

The National Police Accountability Project (NPAP) of the National Lawyers Guild (NLG) is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. Claims of coercive interrogation are raised in significant numbers by the clients served by NPAP. If the Court were to adopt the views of Petitioner herein, it would significantly impair the ability of these clients to obtain a meaningful remedy when their constitutional rights are violated.

The National Black Police Association, Inc. is an advocacy organization created in 1972 and established to represent approximately 20,000 African Americans in law enforcement. It is also involved in the examination and analysis of criminal justice policies and practices that have an adverse impact on people of color and their communities. The National Black Police Association works to educate and train its members, the public, policymakers, and other criminal justice practitioners about the system wide injustices that often happen to the poor and people of color in America.

SUMMARY OF ARGUMENT

I. The Fifth and Fourteenth Amendments to the Constitution are violated when police officers coerce a statement from a suspect, regardless of whether this statement is ever introduced in a criminal trial, and regardless of whether there is a criminal trial. Two lines of cases make this point very clearly - the penalty cases, and the involuntary

[1] No counsel for any party in this case authored this brief in whole or in part and no person or entity other than amici, their members and their counsel have made monetary contributions to the perpetration or submission of this brief.

confession cases. Neither dicta in *United States v. Verdugo-Urquidez* nor the possibility of an official grant of immunity change this point.

A. This Court has consistently held that any attempt by a government official to coerce a waiver of the privilege against self-incrimination violates the Fifth Amendment, regardless of whether the coercion is successful. In those cases where a suspect refuses to waive his privilege, and suffers the coercive consequence, the Court has found a fifth amendment violation to be complete, despite the fact that no incriminating statement was obtained, and thus the admission of such statement in a criminal trial is impossible. The most recent of these penalty cases, *McKune v. Lile*, post-dates earlier dicta to the contrary.

B. At the direction of this Court, law enforcement officers have been advising suspects for the past thirty-six years that they have a right to remain silent. This Court has recognized that the Fifth Amendment guarantees the right to remain silent in cases before and subsequent to *Miranda* both during custodial interrogation and in other contexts. The text of the Fifth Amendment does not compel the conclusion that it creates rights only during criminal proceedings, as this Court recognized in *Pennsylvania v. Muniz*.

C. The Court has permitted government officials to replace the privilege with an immunity grant, in certain circumstances. In *Kastigar v. United States*, the Court held that a suspect can be "compelled" to give testimony in a public proceeding enforced by judicial process, where said suspect is first properly informed that the government is invoking an immunity statute, and informed that neither direct nor derivative evidence obtained in this manner can be used against him in a criminal trial. The Court has never held that police can informally grant immunity by exercising coercive

pressure against a suspect, that police can decide when and whether to grant this testimonial immunity during custodial interrogation without prior or later approval of the public prosecutor, and that police need not even inform the suspect that he has been granted such immunity.

II. The Court reaffirmed *Miranda v. Arizona*'s constitutional exegesis in *Dickerson v. United States*.

A. The *Miranda* warnings and their exceptions are best viewed as constitutional prophylactic rules protecting the privilege against self-incrimination. The ubiquity and legitimacy of constitutional prophylactic rules and remedies has been well established.

B. Without civil rights liability for continuing to question a suspect after invocation of her Miranda right to remain silent, an innocent suspect (for whom exclusion is not an option) will have no method of enforcement. Moreover, officers will be encouraged to advise a suspect of her rights only to ignore any invocation, in order to obtain impeachment and other derivative evidence will is admissible. The Court cannot afford to send out the message that constitutional rules directed toward deterring police abuse are optional.

III. A public safety exception to the Fifth and Fourteenth Amendments is not required on the facts of this case, and any discussion of such an exception would be dictum. There was no emergency requiring immediate information to save lives, rather this case involved simple after the fact evidence gathering.

ARGUMENT

I. The Fifth and Fourteenth Amendments are Violated When Police Officers Coerce a Statement from a Suspect At Any Location.

Petitioner contends that neither the Fifth Amendment nor the Fourteenth Amendment protect the right of a person in police custody to be free from interrogation methods that coerce an involuntary statement.[2] Petitioner is asking this Court to rule that there is no constitutionally protected right to remain silent when questioned by police or other government officials, unless the questioning occurs at or is admitted in a criminal trial. This radical proposition, ignoring the fundamental tenets of this Court's jurisprudence, must be rejected.

A. Early and Recent Precedents of This Court Have Found the Fifth and Fourteenth Amendments Violated Where the Invocation of the Privilege is Penalized, and Where a Statement Is Coerced, Regardless of Whether a Statement is Obtained or Introduced in a Criminal Trial.

The Petitioner's argument that there is no right to be free from coercive interrogation other than at trial is inconsistent with the holdings of this Court that this right can be protected only by applying the privilege against self-incrimination in any pre-trial setting where questioning may elicit an incriminating response. "It is well settled that the prohibition ... privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in

[2] Petitioner acknowledges only the existence of a Fourteenth Amendment right to be free from interrogation practices that violate substantive due process by shocking the conscience.

future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 40, 426 (1986). Thus the Court has found the Constitution violated, and ordered injunctive and other relief, even where there was no possibility that a statement would be used in a criminal trial, and even where no statement was generated.

For example, in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York, et. al.*, 392 U.S. 280 (1968), three public workers who were called before a grand jury refused to sign waivers of immunity and testify against themselves were fired. This Court found a Fifth Amendment violation and ordered the City of New York to reinstate these workers. If a constitutional violation occurs only at trial, the Court could not have stepped in unless and until an incriminating statement was offered in a criminal proceeding against these workers. However, since the workers refused to waive their privilege and never made any statement, the admission of statements in a criminal trial was impossible.[3] Likewise, in *Spevack v. Klein*, 385 U.S. 511 (1967), this Court insisted the State of New York reinstate an attorney who had been disbarred for failing to waive his Fifth Amendment privilege at a judicial inquiry into professional misconduct. Again there was never a resulting statement that could be used in a criminal trial, yet the Court imposed a remedy for the constitutional violation. In *Slochower v. Board of Education*, 350 U.S. 551 (1956), a public school teacher was dismissed for refusing to waive her Fifth Amendment right not to incriminate herself in front of a Congressional Committee. Again, the Court ordered

[3] The Court noted that such a waiver may have been ineffective after *Garrity v. New Jersey*, which would have compelled the state to grant immunity. However, "[t]he possible ineffectiveness of this waiver does not change the fact that the State attempted to force petitioners upon penalty of loss of employment to relinquish a right guaranteed to them by the Constitution." *Sanitation Men*, 392 U.S. at 284.

reinstatement, finding the Fifth Amendment violated despite the fact that no statement was given, hence no admission in a later criminal proceeding was possible.[4]

Most recently, in *McKune v. Lile*, 122 S.Ct. 2017 (2002), this Court accepted that the privilege is available in a psychiatric prison treatment program, again well in advance of any potential criminal case. Though there was sharp disagreement regarding the issue of whether the alleged penalty/loss of benefit imposed on the prisoner (transfer to a more secure facility and loss of privileges) for refusing to admit to the crime of conviction and other prior criminal acts constituted "compulsion" within the meaning of the privilege, every member of this Court accepted the plaintiff's use of 42 U.S.C. section 1983 as a vehicle to obtain an injunction to prevent the imposition of a penalty upon invocation of the privilege. The opinion began by noting that if the program amounted to compulsion, it would have to be terminated.[5] This was true despite the fact that the plaintiff refused to make a statement, and hence the introduction of an incriminating statement at a future criminal proceeding was impossible.

In addition to the penalty cases, which apply and enforce the Fifth Amendment in grand jury proceedings,

[4] *See also Lefkowitz v. Turley*, 414 U.S. 70 (1973), where this Court invalidated a New York statute requiring that public contractors testify before a grand jury and waive immunity from the use of such statements against them in a future criminal trial under threat of loss of contract, and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), holding that a grand jury witness cannot be divested of political office as a penalty for invoking the privilege.

[5] "So the central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form ..." 122 S.Ct. at 2025.

congressional committees, and prison psychiatric interviews, a similar line of cases applies the self-incrimination clause to coercive police interrogations of suspects, regardless of where they occur. In 1897, the Court in *Bram v. United States*, 168 U.S. 532, 542 (1897), first applied the self-incrimination clause to bar involuntary confessions offered in federal criminal trials. A long series of cases post-*Bram* but pre-incorporation applied exactly the same standard to the coercion of statements by state officials, and condemned as a violation of due process the use of overbearing police tactics to coerce confessions from suspects. As in the penalty cases, the Court required that federal and state officials honor a suspect's desire to remain silent. When officers ignore such a desire and engage in conduct which compels an involuntary statement, the privilege (if in federal court) or due process (if in state court) is violated. Though the remedy asked for in those criminal cases was the exclusion of evidence, the Court made clear that the coercion itself was prohibited by the due process clause: "The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ... It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners ..." *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (confession obtaining beatings violate due process) .

See also, Watt v. Indiana, 338 U.S. 49 (1949) ("In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life taken."); *Haynes v. Washington*,

373 U.S. 503, 536 (1963) (a "confession obtained by police use of threats is violative of due process"); *Lynumn v. Illinois*, 372 U.S. 578 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hour interrogation); *Mincey v. Arizona*, 437 U.S. 385 (1978) (questioning gravely ill suspect in hospital).

In *Spano v. New York*, 360 U.S. 315 (1959), the Court clearly demonstrated that the dictates of the Fourteenth Amendment control the legality of the actions by police during interrogations, not merely the actions of judges during trials:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime.

Spano, at 320-21.

Similarly, in *Haynes v. State of Washington*, 373 U.S. 503 (1963), the Court explicitly declared that the methods of the police that were employed to coerce a written confession were themselves "constitutionally impermissible." *Haynes*, at

319. The *Haynes* Court also cited its earlier opinion in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) where it had characterized the interrogation methods themselves as "constitutionally impermissible."

In 1964, this Court explicitly incorporated the Fifth Amendment's privilege into the Fourteenth and applied it to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). Since incorporation, the Court uses the same test for finding that a statement was "compelled" within the meaning of the privilege, or "involuntary" within the meaning of due process, in fact using these terms interchangeably.[6] However, this Court continues to utilize the "due process" approach, perhaps in part because this approach makes it easy for judges to differentiate between statements found involuntary by a judge considering the facts before her (regardless of whether the *Miranda* warnings are required or given), and statements

[6] *See* Lawrence Herman, The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II), 53 Ohio St. L.J. 497 (1992), for lists and comparisons of cases.

Amici do not mean to suggest that the Court has well explained what makes a statement compelled or involuntary. Such effort has stumped the Court and philosophers for as long as they have asked the question. *See, e.g., McKune v. Lile*, 122 S.Ct. 2017 (2002) (O'Connor, J., concurring) (noting failure of both plurality and dissent to offer coherent theory of compulsion); Albert W. Alschuler, Constraints and Confessions, 74 Denv. U.L. Rev. 957 (1997). It is precisely for this reason that the Court has developed categories of official acts that are always considered compelling (threatening loss of employment, *Garrity*, commenting on a defendants refusal to take the stand, *Griffin*), and imposed rules of conduct for police officers to follow during custodial interrogation (the *Miranda* warnings). However, the issue of whether Mr. Martinez' statements were compelled must be resolved in Respondent's favor, as it was below and is not a question upon which *cert.* was granted.

considered involuntary because of *Miranda*'s legal presumption. See *Withrow v. Williams*, 507 U.S. 680, 693 (1993) (eliminating habeas review of *Miranda* claims would not advance federalism or efficiency, as even if dictates of *Miranda* were followed, petitioners could still claim statements were involuntary under "the due process approach").[7] Regardless of whether this Court now chooses to frame the issue as one of due process or of privilege, the voluntariness test and condemnation of coercive police practices should be identical. Just as the constitution is violated at the moment a state official compels an employee to make a statement (and thus waive her invocation of the privilege) by threat of employment loss, the constitution is violated when police officers compel a suspect to make a statement (and thus waive her invocation of the privilege) by threat of continuous harassment.

B. The Fifth and Fourteenth Amendments Protect a Right to Remain Silent During Custodial Interrogations by State Officials.

Two years after incorporation, the Court reaffirmed *Bram* and *Malloy*, again holding that the privilege is applicable at the stationhouse, in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The most familiar legacy of *Miranda*, of course, is the requirement that police officers must advise suspects prior to interrogation that, "You have a right to remain silent." For thirty-six years, countless officers have advised countless Americans, at the specific direction of this Court, that this is a right they possess. Petitioner's argument

[7] This legal distinction is necessary for two reasons. First, statements found to be involuntary given the circumstances cannot be used to impeach, unlike statements presumptively involuntary because of a *Miranda* failure. Second, there are numerous situations, such as a suspect questioned while not in custody, where *Miranda*'s presumption of involuntariness is not triggered.

that the Fifth and Fourteenth Amendments, except for extreme cases that "shock the conscience," apply only at trial, cannot be accepted without concluding that the suspect in the stationhouse in fact has no "right" to remain silent, at least no right that is enforceable.

In assessing whether law enforcement officers were, in effect, ordered by this Court in 1966 to mislead the American public about the nature of their rights, it is useful to consider whether the "right to remain silent" originated only with *Miranda*. It did not. The *Miranda* opinion itself explained that the need to warn suspects that they have a right to remain silent was essential so that suspects would have a simple awareness of a pre-existing Fifth Amendment privilege that could be exercised by remaining silent:

> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it--the threshold requirement for an intelligent decision as to its exercise. ... Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

364 U.S. at 467-468.

This last sentence of this passage also makes clear that the interrogators, having advised the suspect of his rights, were constitutionally required to honor them.

The right to remain silent had been recognized by this Court prior to the decision in *Miranda*. For example, in *Escobedo v. State of Illinois*, 378 U.S. 478, 485 (1964), the Court referred to the suspect's "absolute right to remain

silent" in the face of police accusations. *See also Culombe v. Connecticut*, 367 U.S. 568, 631 (1961); *Crooker v. State of California*, 357 U.S. 433, 440 (1958) (referring to "a voluntary confession by a college-educated man with law school training who knew of his right to keep silent").

This Honorable Court has consistently described the Fifth Amendment privilege as including a right to remain silent, regardless of the context in which it is exercised. For example, it is clear that a criminal defendant has a "right to remain silent" during a psychiatric interview arranged by the state in connection with determining future dangerousness as a factor bearing on the imposition of the death penalty. *Estelle v. Smith*, 451 U.S. 454 (1981). The Court has not merely held that unwarned statements taken from a prisoner cannot be introduced in evidence against him–it has made clear that the defendant may not be compelled to answer the psychiatrist's questions:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, *may not be compelled to respond to a psychiatrist* if his statements can be used against him at a capital sentencing proceeding. *Id.* at 468.

In a completely different context, the Fifth Amendment protects a public employee's "right to remain silent" in response to questions put to him by his employer where the answer might lead to a criminal prosecution. As Chief Justice Rehnquist recently noted for a unanimous Court in *LaChance v. Erickson*, 522 U.S. 262 (1998): "If answering an agency's investigatory question could expose an employee to a criminal prosecution, he may exercise his Fifth Amendment *right to remain silent*." *Id.* at 267.

These cases demonstrate that the right to remain silent in the face of police inquiries is both implicit in the concept of ordered liberty and recognized by this Nation's history and tradition.

Petitioner and *amici* in support of petitioner now also suggest that the *text* of the Fifth Amendment, specifically the references to a "witness" in a "criminal case" compel the conclusion that Fifth Amendment rights do not exist during interrogation by the police and thus the only "right" protected by *Miranda* and the Fifth Amendment is the right to exclusion of a coerced or non-Mirandized statement in a criminal trial. This Court has already visited this issue in the pre- and post-*Miranda* penalty cases, discussed in part IA, and in *Miranda* itself. Moreover, in *Pennsylvania v. Muniz,* 496 U.S. 582 (1990), the Court made clear that a person is a "witness against himself" when he provides the state with evidence of a "communicative nature," and that application of the Amendment is not limited to testimony that takes place in a courtroom.

The Court specifically held that a suspect may be compelled to be a witness against himself during custodial interrogation:

> Because the privilege was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality,' it is evident that a suspect is 'compelled ... to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma--either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda,* the choices are analogous and hence

raise similar concerns. *Id.* at 596 (footnote and citation omitted).

Repeating language from *Miranda*, the Court concluded that despite the differences between courtroom testimony and custodial interrogation, "[w]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." *Id.* at 596, n. 10, (quoting *Miranda*, 384 U.S. at 461).

The Petitioner and amici in support of Petitioner rely heavily on a statement from this Court's opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) that a Fifth Amendment "violation occurs only at trial."

In *Verdugo* the Court considered "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." Id. at 261. The holding of the case was limited solely to the search in Mexico, the Fourth Amendment and the rights of aliens.

The Court in *Verdugo* rejected the argument that Fourth Amendment rights are violated by introduction of evidence at trial, concluding that the exclusionary rule is remedial.

The Court, for the sake of illustration, contrasted the Fourth Amendment with the Fifth, where there is clearly a violation at trial if a coerced statement is introduced in evidence. The Court had no occasion to consider, even for the purpose of the comparison it was making, whether a Fifth Amendment violation can occur prior to trial.

C. *Kastigar* Immunity Permits Compulsion Only Where A Suspect Is Promised Use and Derivative Use Immunity Pursuant to Statute, and Testimony is Compelled in a Public Judicial Proceeding.

Petitioner apparently believes that *Kastigar* heralded a radical change in Fifth and Fourteenth Amendment jurisprudence. According to this theory, police and other government officials can use any method to compel a statement that could potentially be incriminating in a future criminal proceeding without violating the Fifth Amendment, because a court will later exclude the resulting statement. *Kastigar* in fact stands for a much narrower proposition. A government official may use a certain form of compulsion, utilizing judicial process in a public fora, in exchange for an explicit promise, pursuant to state statute, not to use that statement or any evidence derived from that statement in a future state or federal criminal prosecution. The two requirements before *Kastigar* immunity is coextensive with the privilege are clear: (1) the "compelled" testimony must be taken in a public proceeding enforced by judicial process; and (2) the suspect must be properly informed that the government is invoking an immunity statute, whereby neither direct nor derivative evidence can be used against him in a future criminal proceeding. The first requirement ensures that the testimony is accurately transcribed, obtained in a humane manner (by public questioning), and enforced by legal process (threat of contempt, rather than threat of a beating, sleep or food deprivation, or psychological harassment). The second requirement ensures that there is no possibility of future incriminating use of this testimony.

Neither of these requirements is met when police coerce statements from suspects in the backroom of the stationhouse. During the majority of custodial interrogations,

there is no video or audio recording to transcribe what the suspect actually said and to memorialize what form of compulsion was used. This is, then, a *private* proceeding where compulsion is exerted by the policeman. Moreover, the suspect has no promise of official immunity pursuant to statute, or even any guarantee that a later court will in fact find a resulting statement coerced and exclude it. Even if such exclusionary findings were uniform among Circuits and predictable, few suspects would be sufficiently conversant with the law to make such an advance judgment.

The relationship between judicial grants of immunity and the privilege against self-incrimination was explored at greater length in *United States v. Balsys,* 524 U.S. 666 (1998). The Court held that the Fifth Amendment does not apply when the only fear of prosecution is in a foreign country. The Court explained that the Fifth Amendment privilege also protects against using statements compelled by the federal government in state prosecutions and statements compelled by state officials in federal prosecutions, as a consequence of the Court's decisions in *Murphy v. Waterfront Comm'n. of N.Y. Harbor*, 378 U.S. 52 (1964) and *Malloy v. Hogan*, 378 U.S. 52 (1964). In this connection, the Court explained the nature of the government's power to offer immunity in exchange for testimony that would otherwise be protected by the Fifth Amendment privilege:

> [U]nder the Self-Incrimination Clause, the government has an option to exchange the stated privilege for an immunity to prosecutorial use of any compelled inculpatory testimony. The only condition on the government when it decides to offer immunity in place of the privilege to stay silent is the

> requirement to provide an immunity as broad as the privilege itself.

Balsys, at 682.

Murphy achieved this by imposing an exclusionary rule prohibiting the federal use of testimony compelled by a state in the absence of a statute effectively providing for federal immunity.

Justice Souter's opinion for the Court, however, makes clear that this judicially created immunity is not the primary vehicle for enforcing the Fifth Amendment, but only a "fail-safe" device "to ensure that compelled testimony is not admitted in a criminal proceeding" in the absence of a previous grant of immunity. Id. at 683, n. 8. The Court explained:

> The general rule requires a grant of immunity prior to the compelling of any testimony. We have said that the prediction that a court in a future criminal prosecution would be obligated to protect against the evidentiary use of compelled testimony is not enough to satisfy the privilege against compelled self-incrimination. The suggestion that a witness should rely on a subsequent motion to suppress rather than a prior grant of immunity 'would [not] afford adequate protection. Without something more, [the witness] would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id. (citations omitted).

Balsys thus makes clear that the constitutionality of compelling testimony on the basis of a grant of immunity does not mean that the Fifth Amendment privilege is a "trial right"

only. Clearly the "right to remain silent" is protected by the Fifth Amendment prior to and at the time of any government attempt to compel or coerce a statement.

Thus, Mr. Martinez could have been brought in front of a grand jury and "compelled," upon pain of formal judicial sanction, to recount his version of events the night he was blinded and crippled by a police officer, even if such statements might have been incriminating, after an official grant of immunity from the state of California. He may not, however, be secreted to the back room of a station house (or confined to a hospital bed) and be subjected to the third degree until he breaks, despite the fact that any resulting statements will never by used in a future criminal proceeding (because they will be properly excluded by the state judge as involuntary, because Mr. Martinez is an innocent man and never charged, or because Mr. Martinez might later agree to testify for the government in exchange for a *nolle pros)*. The privilege against self-incrimination and due process clauses of the Fifth and Fourteenth Amendments were violated by the coercive tactics of harassing Mr. Martinez for 45 minutes while he screamed in pain and begged to be left alone. This is not the form of compulsion the *Kastigar* Court blessed, and no immunity was offered.

In petitioner's world, a statement can be physically or psychologically coerced from a suspect upon the whim of a police officer, and the suspect's invocation of her privilege safely ignored. In the real world, every professional police officer knows such behavior violates the constitution. Thus, there is uniform agreement among the lower courts that interrogation practices which coerce a statement from a suspect leads to liability under 42 U.S.C. 1983, absent qualified immunity. Whether those courts call such coercion

a violation of the Self-Incrimination or Due Process Clause,[8] they all agree the constitutional violation is complete

[8] *See, e.g., Deshawn E. v. Safir*, 156 F.3d 340, 348 (2nd Cir. 1998) ("the Due Process Clause of the Fourteenth Amendment prohibits self incrimination based on fear, torture or any other type of coercion. . . .the question in each case is whether the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self determined.") *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (an attempt to coerce an incriminating statement constituted a viable ' 1983 claim for violation of the Fifth and Fourteenth Amendment); *Weaver v. Brenner*, 40 F.3d 527, 536 (7th Cir. 1994) (". . . if the confessor is found as a fact to have been coerced, [this] violates [plaintiff's] constitutional rights and serves as the predicate for his ' 1983 action."); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) (there "is no indication. . .that physical violence need be present to produce the coercion. . .cognizable under ' 1983); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244 (7th Cir. 1990) (if the prosecutor coerced confession by "depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon," then the constitutional injury is complete at that moment), *vacated and remanded*, 112 S.Ct. 40 (1991), *affirmed as modified*, 952 F.2d 965 (7th Cir. 1992), *reversed on other grounds*, 509 U.S. 259 (1993); *Rex v. Teeples*, 753 F.2d 840, 843 (9th Cir. 1985) ("We also conclude that [plaintiff] has stated the constitutional claim arising from the interrogation. Extracting an involuntary confession by coercion is a due process violation."); *Cooper v. Dupnik*, 963 F.2d 1220, 1237 (9th Cir. 1992) (*en banc*) ("It is irrelevant that Cooper's coerced statements were never introduced against him at trial the task force's wrongdoing was complete at the moment it forced Cooper to speak."); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) (upholding ' 1983 action and denying qualified immunity for defendant who used a coerced statement and a warrant to arrest plaintiff, although such statement was never introduced in a criminal case).

Pre-*Miranda*, preincorporation cases likewise allowed a ' 1983 claim based upon a coerced confession, regardless of whether the statement was used in court. *See, e.g., Robichaud v. Ronan*, 351 F.2d 533, 534 (9th Cir. 1965); *Geach v. Moynahan*, 207 F.2d 714, 615 (7th Cir. 1953); *Refoule v. Ellis*, 74 F.Supp. 336, 339 (No. Dist. Ga. 1947).

regardless of whether the resulting statement is ever used or offered in a criminal proceeding.

II. This Court's Recent Precedent in *Dickerson* Affirms That The Constitution Mandates that Officers Deliver the *Miranda* Warnings and Honor the Invocation of these Rights.

Should this Court find that Respondent's statement was not "involuntary" or "compelled" within the meaning of the Self-Incrimination and Due Process Clauses, the Court should nonetheless permit a civil rights action based upon Petitioner's refusal to honor Respondent's invocation of his *Miranda* rights. Unlike the uniform agreement among the courts of appeals that the Self-Incrimination and Due Process Clauses are violated when an officer coerces a statement from a suspect, there is sharp disagreement over whether a *Miranda* violation (in the form of failure to deliver the warnings or refusal to honor a suspect's invocation of rights) is cognizable in a § 1983 claim.[9]

[9] A minority of circuits hold that where a police officer intentionally disregards a suspects invocation of one of his Miranda rights, there is a violation of the Fifth Amendment regardless of whether any resulting statements were actually coerced or used in a criminal trial. *See California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000) (police department scheme to continue to question suspects despite the invocation of their *Miranda* rights, violated clearly established law and constituted a 42 U.S.C. Section 1983 violation); *United States v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990) ("where *Miranda* warnings are not given, the constitutional violation occurs independent of the grand jury.").

The majority of circuits hold that a mere *Miranda* violation cannot constitute a section 1983 action, either because the resulting statement is only presumptively (not actually) coerced, the resulting statement is never used in a criminal trial, the police officers are not the proximate cause of the plaintiff's injury, or the police officers testifying

The position which best harmonizes *Miranda*'s purpose and exceptions with this Court's reaffirmation of *Miranda*'s constitutional pedigree in *United States v. Dickerson*, 530 U.S. 428 (2000), is that where law enforcement officers disregard a suspect's invocation of her *Miranda* right to remain silent, they may be liable for monetary penalties pursuant to 42 U.S.C. § 1983. Any officer making a reasonable mistake regarding whether a suspect invoked her *Miranda* right to silence or counsel would be fully protected by the doctrine of qualified immunity.

Prior to the *Miranda* Court's requirement that police officers inform suspects of their privilege against self-incrimination and right to counsel, officer conduct during custodial interrogation was deemed unconstitutional only if, considering the "totality of circumstances," they overbore a suspect's will.[10] After 30 years of attempting to ensure that police do not coerce statements from suspects by examining each confession which came before it, the Court admitted defeat. Thus, the *Miranda* Court demanded the four warnings (or an equally effective alternative) to accomplish two goals. First, it eased its own adjudicative task by providing an objective model against which all custodial interrogations

as witness and not acting under color of law. *See* Susan R. Klein, Miranda *Deconstitutionalized When the Self Incrimination Clause and Civil Rights Act Collide*, 143 U. PENN. L. REV. 417, 434-48 (1994) (collecting cases and suggesting, as since accomplished in *Dickerson*, that the Court reconstitutionalize *Miranda*).

[10] This test examines the conduct of the police in interrogating the suspect (threats or promises, trickery, withholding food and water, the duration of the questioning, plays upon sympathy, and the use of family and friends) and the characteristics of the suspect that may make him susceptible to coercion (age, intelligence, education, psychological problems and physical limitations). *See, e.g.*, *Colorado v. Connolly*, 479 U.S. 157 (1986) (some police pressure required).

could be measured. The Court simply couldn't review a sufficient number of cases, and the risk of erroneously admitting involuntary statements was too high.[11] Second, it prevented violations of the Self-Incrimination Clause by issuing a set of "bright-line" rules for police officers to follow during custodial interrogations.[12] It was difficult for honest law-abiding officers to know in advance when the inherent pressure surrounding custodial interrogations became unconstitutional compulsion. There is no doubt that the *Miranda* Court intended to directly regulate police conduct, as such Court regulation of the police provides the only assurance that practices of this nature will be eradicated in the foreseeable future."*Miranda*, 384 U.S. at 447. The *Miranda* decision is best viewed as a compromise between the values enshrined in the Fifth Amendment and law enforcement's interest in crime fighting, a compromise that favors law enforcement.

Just two terms ago, the Court definitively resolved the issue of whether the *Miranda* warnings were required by the privilege against self-incrimination in *Dickerson*. In answering in the affirmative, Chief Justice Rehnquist noted that "we have consistently applied *Miranda*'s rule to prosecutions arising in state courts. . . . with respect to proceedings in state courts, our 'authority' is limited to enforcing the commands of the United States Constitution.'" *Dickerson*, 530 U.S. at 438. Though Chief Justice Rehnquist

[11] As Chief Justice Rehnquist noted in *Dickerson*, "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment...'"530 U.S. at 435.

[12] As Chief Justice Rehnquist recently explained, the *Miranda* Court granted *certiorari* "to give concrete constitutional guidelines for law enforcement agencies and court to follow." *Dickerson*, 530 U.S. at 435.

acknowledged that the Court has "repeatedly referred to the *Miranda* warnings as "prophylactic," and thus subject to exceptions by the Court or substitution by Congress, this does not mean that the *Miranda* warnings are "not themselves rights protected by the Constitution" but that "no constitutional rule is immutable." 530 U.S. at 438, 441 (quoting *Michigan v. Tucker*, 417 U.S. 433 (1974)).

In fact, scholars have long recognized and applauded the Court's duty to develop "constitutional common law" to both prevent and remedy constitutional violations.[13] "Constitutional criminal procedure is rife with prophylactic rules, which most often take the form of rebuttable or conclusive evidentiary presumptions or bright-line rules for law enforcement officials to follow." Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules: Safe Harbors and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001). While more overprotect the constitutional right at issue and thus favor the civil liberties of crime suspects, some of them provide "safe harbors" to government officials following certain procedures, and thus favor law enforcement. *See id* at 1037-47.

[13] *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines; Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001) David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 287 (1988); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986);. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 203 (1975); Paul Bator, et al, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 700, 770 (2d 1973).

A. While This Court Has Permitted Limited Use of Statements Obtained After *Miranda* Violations, the U.S. Constitution Mandates that Officers Provide the *Miranda* Warnings and Honor The Invocation of these Rights.

Just as it is legitimate to craft constitutional prophylactic rules, it is legitimate to impose limits and exceptions upon them. As with crafting exceptions to core constitutional provisions,[14] this Court has been willing to craft exceptions to constitutional prophylactic rules and remedies where such exceptions do not hamper the goals of deterrence of executive misconduct or ease of adjudication, or where there are other equally weighty interests at stake.

One example of Court-created constitutional common law is the Fourth Amendment exclusionary sanction developed in *Weeks v. United States*, 232 U.S. 383 (1914) and imposed on state actors in *Mapp v. Ohio*. 367 U.S. 643 (1961). Though this sanction is imposed only after a violation of the Fourth Amendment, the Constitution itself does not demand it as a remedy for the violation.[15] Rather, the exclusionary sanction is a judicially created procedure designed to deter future Fourth Amendment violations, and the Court has not been hesitant to create numerous exceptions to the exclusionary rule wherever its costs (in terms of the truth-seeking function of a criminal trial) outweigh its deterrent effect (in terms of preventing Fourth Amendment violations

[14] *Schenck v. United*, 249 U.S. 47 (1919) (the First Amendment free speech right does not extend to yelling "fire" in a crowded movie theater); *Warden v. Hayden*, 387 U.S. 294 (1967) (police can search without warrant in emergency despite Fourth Amendment).

[15] Unlike violations of the Fifth Amendment's self-incrimination clause or sixth amendment right to counsel, which would demand exclusion as part of the right itself.

by police officers).

Likewise, in the Fifth Amendment context, the Court has limited the judicial consequences of a violation of *Miranda*'s constitutional prophylactic rule where imposing exclusion from a criminal trial would not deter police misconduct or would otherwise have unacceptable costs. Thus, in a series of cases this Court excluded statements taken in violation of *Miranda* only from the prosecutor's case-in-chief, allowing the use of such statements for impeachment purposes if the defendant chooses to testify, and permitting the use of derivative evidence. After the Court considered the serious costs of applying the exclusionary rule in those circumstances, such as a "license to use perjury by way of defense," blocking a witness' voluntary decision to testify, or excluding reliable derivative evidence, it decided to limit the exclusionary sanction to the prosecutor's case-in-chief. *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Elstad*, 470 U.S. 298, 316 (1984). Where public safety is at risk, the Court has gone even further, not requiring that the *Miranda* warnings be delivered. *New York v. Quarles*, 467 U.S. 649 (1984) (public safety interests in removing a gun from a grocery store outweighed the deterrent effect of the prophylactic rule).

Just as the Court has limited Miranda's exclusionary remedy where deterrence is not fostered and other values are at stake, it has extended *Miranda*'s exclusionary sanction where necessary to deter police coercion and ease the Court's task of adjudication. Thus, the Court held in *Arizona v. Roberson*, 486 U.S. 675 (1988), that police cannot initiate interrogation even about other crimes, once a suspect has invoked his *Miranda* right to counsel. As Justice Kennedy explained, after *Miranda* was extended again in *Minnick v. Mississippi*, 498 U.S. 146 (1990), to cover situations where

suspects had consulted with their attorney, this rule "ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, ... [The] rule provides clear and unequivocal guidelines to the law enforcement profession."

None of the cases expanding or contracting *Miranda*'s exclusionary remedy speak to the Court's willingness to allow police departments to develop schemes to refuse to deliver the *Miranda* warnings, in the absence of public safety considerations, without constitutional liability. Moreover, no case condones a plan to ignore a suspect's invocation of her rights. Such action by police officers is clearly unconstitutional in the wake of *Dickerson*, regardless of whether judicially-created remedies by the Court exclude or admit statements taken in violation of this constitutional provision. Officer misconduct can best be deterred by means less costly to truth seeking function of trial than exclusion, such as by civil rights actions.

B. Civil Rights Liability For Continuing to Question a Suspect After her Invocation of the *Miranda* Right to Remain Silent Is Necessary to Safeguard the Privilege Against Self Incrimination

If the Court excludes from civil rights liability unreasonable violations of Fifth and Fourteenth Amendment rights, there will be no effective protection for the right to be free from coercive interrogation. In the first place, the exclusionary rule is actually invoked only in a tiny fraction of all serious criminal cases. Over 90% of felony cases are resolved by a plea and no trial is ever held.[16]

[16] Between October 1999 and September 2000, of the 68,079 federal criminal cases disposed of by plea or trial, 63,863 (93.8%) defendants

Moreover, consider the present incentive structure for an honest officer intent on solving a crime. Where it is clear that a suspect is in custody and undergoing interrogation, the two triggers of the *Miranda* rule, most rational officer will read the warnings. 80% of suspects waive their *Miranda* rights,[17] and the officer can correctly predict that he will, most likely, obtain an admissible statement. This incentive structure is turned on its head once a suspect actually invokes any *Miranda* right. An officer who honors a suspect's invocation of his right to remain silent or consult with an attorney obtains absolutely no benefit from honoring the invocation -- he gets no statement or fruits. On the other hand, a rational police officer who ignores a suspect's invocation of his *Miranda* rights, at least in the absence of monetary liability under § 1983, has nothing to lose and much to gain. If his continued questioning succeeds in convincing a suspect who has invoked his *Miranda* right to waive them instead, he may obtain a useful statement. Though such a statement will be excluded from the prosecutor's case-in-chief, it can be used to keep the defendant off the stand and to lead to other witnesses or physical evidence of the crime.

pleaded guilty, 1235 (1.8%) were convicted or acquitted after bench trials, and only 2981 (4.4%) were convicted or acquitted after jury trials. Stat. Div., Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary September 30, 2000, tbl.D-4. In 1996 of the 997,972 state felony defendants whose cases were resolved by plea or verdict, 905,957 (90.8%) entered pleas of guilty or nolo contendre, 54,474 (5.5%) had bench trials, and only 37,541 (3.8%) had jury trials. Bureau of Justice Stat., U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1998, tbl.5.42, at 432.

[17] Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

Thus, there are no disadvantages of ignoring a *Miranda* invocation, but numerous advantages. We should therefore not be surprised by the widespread training in California advocating the violation of *Miranda*. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998); Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 MICH. L. REV. 1121 (2001). Nor should we be surprised by the *Cooper* Court's description of an Arizona police agency's decision to ignore *Miranda* invocations in high profile cases. See *Cooper v. Dupnik*, 924 F.2d at 1523-25 (describing joint task force of the Tucson Police Department and the Pima County Sheriff's Department decision to disregard the defendant's request for counsel since 1981), *reversed,* 963 F.2d at 1235. *See also* Klein, Miranda *Deconstitutionalized* at 456-468, *supra* n. 9. (providing additional example of the District of Columbia police department's decisions to ignore *Miranda* in certain cases). Should the Court in the case at bar inform federal, state, and local police agencies that the constitutional prophylactic rules developed in *Miranda* (and throughout constitutional criminal procedure) are actually *optional*, this sends the intolerable signal that judicial restraints on abusive police tactics have been abandoned.

III. This Case Is Not the Appropriate Vehicle for Crafting a Terrorism Exception to the Fifth and Fourteenth Amendments

The Department of Justice argues that this Court should reject civil rights liability for intentional violations of Miranda and for intentional and coercive behavior to obtain involuntary confessions, in part, so that police may "obtain potentially life-saving information during emergencies." Brief for the United States as Amicus Curiae Supporting Petitioner 27. Three pages of their brief are devoted to discussions of

public safety, imminent threat of harm, and exploding bombs. The simplest answer to this argument is that in fact no such emergency existed in this case, nor does Petitioner or any government agency claim that there was such an emergency. Any alleged criminal conduct in this matter was terminated, there were no weapons at large, and there were no victims unaccounted for. This case involved simple evidence-gathering. If this case were viewed as an emergency situation, it would be hard to imagine what the limits of such an exception to the ordinary rules would be. The government's thinly-veiled reference to domestic and foreign terrorism should not persuade the Court to dilute or eliminate Fifth and Fourteenth Amendment protections for citizens in ordinary cases. Should an actual emergency arrive, judicial and executive branch officials have ample means of safeguarding the public.

First, there is already an exception to *Miranda* where public safety is at issue. *See New York v. Quarles*, 467 U.S. 649 (1984). Second, there is nothing to prevent this Court from addressing the question of whether a narrow emergency exception for actual coercion needs to be created, should the appropriate case arise.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Susan R. Klein
Counsel of Record
727 E. Dean Keeton Street
Austin, TX 78705
512-232-1324

Michael Avery
Suffolk Law School
120 Tremont Street
Boston, MA 02108
617-573-8551

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BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
SUSAN N. HERMAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York City, NY 10004-2400
Telephone: (212) 549-2000

JOHN T. PHILIPSBORN
ERWIN CHEMERINSKY
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
Civic Center Building
507 Polk Street, Suite #250
San Francisco, CA 94102
Telephone: (415) 771-3801

MARK D. ROSENBAUM
Counsel of Record
BEN WIZNER
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026-5782
Telephone: (213) 977-9500

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with nearly 300,000 members that has been engaged in defense of the Bill of Rights for more than 80 years. The ACLU of Southern California is its largest affiliate. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as *amicus curiae* in *Miranda v. Arizona*, 384 U.S. 436 (1966). The ACLU continues to believe, as we believed in 1966, that if the Fifth Amendment privilege is to remain an effective guarantor of our accusatorial system of criminal justice, the right to remain silent during custodial interrogation must be protected, both by ensuring that warnings are provided to persons subjected to custodial interrogation, and by requiring police to respect an individual's right to cut off questioning. Further, the ACLU believes that deliberate disregard of *Miranda* severely undermines this Court's endeavor to establish concrete constitutional guidelines for law enforcement agencies to follow during the interrogation process, and tarnishes the integrity of our judicial process.

The California Attorneys for Criminal Justice is a non-profit corporation founded in 1972. CACJ has 2400 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its by-laws, is

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[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

to defend the rights of individuals guaranteed by the United States Constitution. The members of CACJ are gravely concerned about law enforcement efforts to circumvent the Fifth Amendment and the ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). CACJ members accordingly authorized the organization to bring a civil rights action to prohibit questioning over an invocation of the right to counsel. *See Cal. Att'ys for Crim. Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999). CACJ also sponsored legislation in California to prohibit law enforcement agencies from training officers to disregard *Miranda*. *See* S.B. 1211, 2001-01 Reg. Sess. (Cal. 2001). The legislation passed the California Senate but failed to pass the Assembly; it was opposed by the California District Attorneys Association.

You guys wake up out there cuz we got something a little controversial this week. . . . This has to do with questioning "outside Miranda*." Should you do it? When should you do it? What if you do? What if you don't?. . . .*

What if you've got a guy that you've only got one shot at? This is it, it's now or never because you're gonna lose him – he's gonna bail out or a lawyer's on the way down there. . . . And you Mirandize him and he invokes. What you can do – legally do – in that instance is go "outside Miranda*" and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. . . .*

[Y]ou may want to go "outside Miranda*" and get information to help you clear cases. . . . Or, his statements might reveal the existence and the location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used or whatever else it was. . . . So you go "outside* Miranda*" and if he talks "outside* Miranda*" – if the only thing that was shutting him up was the chance of it being used against him in court – and then you go "outside* Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.*

And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial – that he's cooked up with some defense lawyer – that wasn't true. So if you get a statement "outside Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that, because the U.S. Supreme Court in* Harris v. New York *and the California Supreme Court in* People v. May *have told us that we can use statements "outside* Miranda*" to impeach or to rebut. . . . I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, the fact that they weren't Mirandized will mean we cannot use them in the case-in-chief but it does not mean we can't use them to impeach or rebut. So you see you got all those legitimate purposes that could be served by statements taken "outside* Miranda*". . . .*

There's no law that says you can't question people "outside Miranda*". . . . So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're not doing anything improper. . . .*

Now, some people worry, "Gee, if I question a guy 'outside Miranda*,' won't I get prosecuted myself?" "Won't I get sued in civil court for violating his*

civil rights?" Well just ask yourself, have you ever seen hundreds – hundreds and hundreds – of published cases where a court found a Miranda *violation. Did any of those police officers get sued? Zero. . . .*

So, whether you do it is up to you. I don't tell you what to do. Can you do it? Sure you can.[2]

STATEMENT OF FACTS

The facts that gave rise to this litigation were set forth as follows by the court of appeals:

> On November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating narcotics activity near a vacant lot in a residential area of Oxnard, California. While questioning one individual, they heard a bicycle approaching on the darkened path that traversed the lot. Officer Salinas ordered the rider, Oliverio Martinez, to stop, dismount, spread his legs, and place his hands behind his head. Martinez complied.
>
> During a protective pat-down frisk, Officer Salinas discovered a knife in Mr. Martinez's waistband. Officer Salinas alerted his partner and pulled Martinez's hand from behind his head to apply handcuffs. Officer Salinas claims that

[2] Excerpt of transcript of Devallis Rutledge, counsel of record for *Amicus Curiae* National Association of Police Organizations, Inc., in Videotape: *Questioning: "Outside* Miranda*"* (Greg Gulen Productions 1990), *quoted in* Charles D. Weisselberg, *Saving Miranda,* 84 Cornell L. Rev. 109, 189-92 (1998).

> Martinez pulled away from him. Martinez alleges that he offered no resistance. Either way, Officer Salinas tackled Martinez and a struggle ensued.
>
> Both officers testified that during the struggle Martinez did not attempt to hit or kick them; Officer Salinas struck the only blow. The officers maintain that Martinez drew Officer Salinas's gun and pointed it at them. Martinez alleges that Officer Salinas began to draw his gun and that Martinez grabbed Officer Salinas's hand to prevent him from doing so.
>
> All parties agree that Officer Salinas cried out, "He's got my gun." Officer Pena drew her weapon and fired several times. One bullet struck Martinez in the face, damaging his optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.
>
> The patrol supervisor, Sergeant Ben Chavez, arrived on the scene minutes later along with paramedics. While Sergeant Chavez discussed the incident with Officer Salinas, the paramedics removed the handcuffs so they could stabilize Martinez's neck and back and loaded him into the ambulance. Sergeant Chavez rode to the emergency room in the ambulance with Martinez to obtain his version of what had happened.
>
> As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting *Miranda* warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows

that he returned and resumed questioning. Chavez turned off the tape recorder each time medical personnel removed him from the room. The transcript of the recorded conversation totals about ten minutes and provides an incontrovertible account of the interview.

Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

Martinez v. City of Oxnard, 270 F.3d 853, 854-55 (9th Cir. 2001); App. 2a-4a.

SUMMARY OF ARGUMENT

Time and again, for nearly four decades now, this Court has made clear that once a criminal suspect has invoked his right to silence or to an attorney, police interrogation must cease. *See, e.g., Davis v. United States*, 512 U.S. 452, 458 (1994) ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77

(1991) ("Once a suspect asserts the right [to counsel], . . . the current interrogation [must] cease."); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) ("[W]hen counsel is requested, interrogation must cease."); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) ("[A]fter a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980)); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("[O]nce the accused 'states that he wants an attorney, the interrogation must cease.'") (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)); *Edwards*, 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Rhode Island v. Innis*, 446 U.S. 291, 293 (1980) ("In *Miranda* [], the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.") (citation deleted); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("[A]n accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.") (footnote omitted). The strength of this rule "lies in the clarity of its command and the certainty of its application." *Minnick*, 498 U.S. at 151.

Petitioner's and *amici*'s arguments may be reduced to the proposition that this Court's repeated admonitions to law enforcement, far from being clear commands, are in fact no more than suggestions, and that law enforcement compliance is thus optional, rather than mandated. Put otherwise, petitioner contends that the court of appeals

has erred by taking this Court's words seriously, while law enforcement officers have acted properly, even commendably, by willfully ignoring them.

Miranda was intended in part as a rule of deterrence: if law enforcement officers failed to abide by the rules governing custodial interrogation so unequivocally laid down by this Court, any statements obtained from the accused would be excluded from trial. *See, e.g., Michigan v. Tucker,* 417 U.S. 433, 447 (1974) ("By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."). Instead, some law enforcement officers have systematically exploited the exceptions to *Miranda*'s exclusionary rule and, because they have largely not been faced with civil liability, have had a clear *incentive* to violate *Miranda*'s dictates – an incentive that will necessarily be approved and fortified if this Court "signal[s] police departments that they are free to disregard *Miranda* if they are willing to pay the price of exclusion" from the case in chief. Steven D. Clymer, *Are the Police Free to Disregard* Miranda*?,* 112 Yale L.J. ___ (forthcoming December 2002). "[T]hat message likely will lead to increased, and perhaps widespread, police noncompliance with the *Miranda* rules." *Id.*

The question this Court must now confront, then, is how to address flagrant and willful violations of *Miranda*'s dictates by law enforcement agencies that systematically and institutionally disregard this Court's admonitions. Such conduct "offend[s] the community's sense of fair play and decency," *Rochin v. California,* 342 U.S. 165, 173 (1952), and debases the well settled principle that "the police must obey the law while enforcing the law. . . . "

Spano v. New York, 350 U.S. 315, 320-21 (1959). At least until this case, with the exception of narrowly defined and clearly specified exigencies, the right to remain silent has been treated as sacrosanct, perhaps the single admonition from this Court that is most clearly identified by the public as synonymous with respect for the rule of law and the workings of our criminal justice system. If this Court curtails the availability of civil remedies for blatant disregard of that right, then what were intended as "concrete constitutional guidelines for law enforcement agencies," *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (quoting *Miranda*, 384 U.S. at 442), will increasingly be treated as mere suggestions – suggestions, moreover, that officers who disagree with *Miranda*'s tenets will deem irrational to follow.

The court of appeals' decisions holding that officers who willfully violate *Miranda*'s dictates may face suit under section 1983 find strong support in this Court's *Miranda* jurisprudence, and are consistent with a long line of cases holding that the Fifth Amendment may be violated outside of a trial setting. But even if this Court were to reject the Fifth Amendment analysis of the decision below, it should make clear that deliberate violations of *Miranda*'s requirements fall afoul of the Due Process Clause, and that an officer need not physically or psychologically torture a suspect in order to face liability under section 1983 for violation of the Fourteenth Amendment.

ARGUMENT

I. The Fifth Amendment's Self-Incrimination Clause Prohibits Police Officers From Compelling Statements During Custodial Interrogation

A. This Court Has Long Made Clear That the Fifth Amendment May Be Violated Outside of a Trial Setting

As the statement of facts makes clear, Sergeant Chavez disregarded *Miranda*'s dictates when he neglected to provide warnings to Martinez, and again when he persisted in questioning Martinez following express invocations of Martinez's right to remain silent. Petitioner does not deny that he intentionally questioned Martinez "outside *Miranda*." Instead, petitioner contends that *Miranda* does not in fact confer a right to remain silent during custodial interrogation, and that this Court's contextual statement in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) – that the "privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants . . . and [that] a constitutional violation occurs only at trial," *id.* at 264 – accurately sums up the Court's Fifth Amendment jurisprudence and dictates the outcome of this case. Putting aside the question whether the court of appeals properly characterized the above statement as "dicta," it is beyond dispute that this Court has, on numerous occasions, found violations of the Fifth Amendment outside of a trial setting. To hold, as petitioner suggests, that a violation of the Fifth Amendment can occur *only* at trial

would be to overturn decades-old precedents and to alter longstanding prosecutorial practices.[3]

Indeed, this Court has only recently reaffirmed that the Fifth Amendment may be violated in a case that never reaches trial, and thus that the privilege is more than a constitutionalized rule of evidentiary admissibility. In *United States v. Hubbell*, 530 U.S. 27 (2000), the Court affirmed the dismissal of an indictment on the ground that the prosecution had used the suspect's immunized act of producing documents to obtain the indictment and to prepare the case for trial. *See id.* at 41. The Court explained that the words "in any criminal case" in the text of the Self-Incrimination Clause "might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *Id.* at 37.

Hubbell, as the Court itself acknowledged, is only the most recent of many cases holding that the Fifth Amendment is more than a trial exclusionary rule. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court upheld the federal immunity statute, 18 U.S.C. §§ 6002-03, finding the statute's protections to be "coextensive with the scope of the privilege." *Id.* at 453. The Court approved the

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[3] A more thorough discussion of the incompatibility of this Court's statement in *Verdugo-Urquidez* with the Court's core Fifth Amendment jurisprudence can be found in *Brief of the National Police Accountability Project and the National Black Police Association as Amici Curiae.*

statute because a grant of immunity removes the "danger of incrimination," *id.* at 459; a person with immunity may be compelled to be a witness, but not a witness against himself. Critically, *Kastigar* does not stand for the proposition that the Fifth Amendment is violated only if compelled testimony is introduced at trial. Were that the case, then the immunity statute as written would have been *broader* than the Fifth Amendment, not coextensive with it; moreover, the Fifth Amendment would be fully protected by leaving it to defendants to object to the introduction of compelled evidence, and relying upon trial judges to exclude that evidence. That is not, however, the law. A witness can be compelled to testify over a valid claim of self-incrimination only if a prosecutor first obtains an order of immunity. As this Court has explained, "[w]e do not think that . . . a predictive judgment [that evidence will be excluded] is enough." *Pillsbury Co. v. Conroy*, 459 U.S. 248, 261 (1983).

This understanding of *Kastigar* and the Fifth Amendment is wholly in keeping with the so-called "penalty cases," such as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Those cases make clear this Court's insistence that when the government compels testimony by threatening to inflict sanctions and does not guarantee immunity, "that testimony is *obtained* in violation of the Fifth Amendment and cannot be used against the defendant." *Cunningham*, 431 U.S. at 805 (emphasis added); *see also Turley*, 414 U.S. at 83 (disqualification from public contracting for asserting the privilege, without a guarantee of immunity, violates the Fifth Amendment). Neither Cunningham nor Turley was ever subjected to a criminal prosecution.

There, as here, the Fifth Amendment was violated without the filing of any criminal charges.

B. *Miranda* and its Progeny Firmly Established That the Fifth Amendment Prohibits Compulsion During Custodial Interrogation

This Court's decision in *Miranda* is thus consistent with the penalty and immunity cases in affirming the principle that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. That the Court plainly meant its holding in *Miranda* to extend beyond the question of evidentiary admissibility cannot seriously be disputed; it proclaimed in no uncertain terms that once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease,*" and that if the suspect "states that he wants an attorney, the interrogation *must cease until an attorney is present.*" *Id.* at 473-74 (emphases added). The Court also noted with approval the government's concession "that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." *Id.* at 463 (citation omitted); *see also Moran v. Burbine*, 475 U.S. 412, 420 (1986) ("To combat this inherent compulsion [of custodial interrogation], and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda imposed on the police an obligation to follow certain procedures in their dealings with the accused.*") (emphasis added).

Subsequent cases have emphatically reinforced that message without qualification; indeed, in *Rhode Island v. Innis*, this Court expressly characterized *Miranda*'s central holding in the following terms: "[O]nce a defendant in custody asks to speak with a lawyer, *all interrogation must cease* until a lawyer is present." *Innis*, 446 U.S. at 293 (emphasis added). In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court discussed extensively *Miranda*'s requirement that law enforcement officers must recognize a suspect's "right to cut off questioning." *Id.* at 103 (*quoting Miranda*, 384 U.S. at 474). The Court elaborated: "Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting." *Id.* at. 103-04. It is plain that there could exist no *right* to cut off questioning if the Fifth Amendment protected criminal suspects solely against the admission of their self-incriminating statements in the case in chief.

Perhaps this Court's clearest statement regarding the reach of the Fifth Amendment's out-of-court protections appears in *Michigan v. Tucker*, in which the Court explained that the question whether police conduct violates the Fifth Amendment and the question whether compelled testimony should be excluded at trial must be treated as separate and distinct inquiries: "We will therefore *first* consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated *only* the prophylactic rules developed to protect that right. We will *then* consider whether the evidence derived from this

interrogation must be excluded." *Tucker*, 417 U.S. at 439 (emphases added). The two-part inquiry employed in *Tucker* simply cannot be squared with petitioner's contention that the right against self-incrimination may be infringed only at trial. And most recently, in *Dickerson*, this Court reaffirmed that *Miranda* had "laid down 'concrete constitutional guidelines for law enforcement agencies *and* courts to follow,'" again stating that *Miranda* imposes constitutional restraints on both police conduct and evidentiary admissibility. *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 442) (emphasis added); *see also Fare*, 442 U.S. at 718 ("[W]hatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, *and* of informing courts under what circumstances statements obtained during such interrogation are not admissible.") (emphasis added).

C. *Miranda*'s Stated Goal of Deterring Compulsion During Custodial Interrogation Will be Eviscerated if This Court Approves the Practice of "Outside *Miranda*" Questioning

A generation of Americans has grown up since 1966 confident that if brought to the police station for questioning, we have the right to remain silent, that the police will warn us of that right, and – above all – that they will respect its exercise. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621, 671-72 (1996). So ingrained is this teaching that *Miranda* is

synonymous in the public mind with the "right to remain silent"; we know that to invoke the former is to assert the latter without the necessity of saying so. If petitioner's theory of the Fifth Amendment is correct, the public's confidence has been misplaced for all these decades and is about to be shattered. If, indeed, *Miranda* guarantees no such right to silence – but only a right against the judicial admission of incriminating testimony – then law enforcement officers will be permitted to convert *Miranda* from a shield against coercion of a citizen's will into a powerful sword, available at an officer's will or whim, to induce confessions for a variety of purposes. For it is precisely the public's familiarity with *Miranda* that heightens the unconstitutional duress inherent in so-called "outside *Miranda*" questioning; when a suspect knows that a vital right is being denied to him, he is more likely to fear that he has no recourse but to comply with police demands.

Employing petitioner's theory, law enforcement officers throughout the country – most prominently in California – already have been trained to disregard the exercise of rights guaranteed by *Miranda* and to continue to interrogate suspects who have invoked their right to silence or to counsel. *Miranda*'s acknowledged goal of deterring police misconduct during interrogation, already considerably weakened, will be all but eviscerated if this Court embraces petitioner's theory and forecloses civil remedies for deliberate violations of *Miranda*.

More than any other circuit, the court of appeals below has been confronted with repeated, systematic, and institutionalized violations of *Miranda*'s dictates by police departments that have expressly instructed their officers on the benefits of questioning "outside *Miranda*." In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc),

the court considered the tactics of a Tucson, Arizona police and sheriff's department task force that had been formed to apprehend a notorious rapist. The task force had devised a strategy for interrogating eventual suspects: the "core of their plan was to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed." *Id.* at 1224. As one task force member testified, "*You know, whether he asked for an attorney or for his mommy or whatever he asked for, if he asked to remain silent, I wasn't going to stop. We decided it was going to be very clear-cut, forget his* Miranda *Rights, the hell with it.*" *Id.* at 1226 (emphasis in original). Seven years later, in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), the court was again presented with "a policy of the defendant police to defy the requirements of *Miranda v. Arizona* [ ]. The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects 'outside *Miranda*' despite the suspects' invocation of their right to remain silent and their requests for an attorney." *Butts*, 195 F.3d at 1041 (citation deleted). In both cases, the court held that officers who deliberately violated *Miranda*'s dictates could be found civilly liable for their misconduct. Citing *Miranda*'s requirement that "all custodial interrogations be preceded by a specified advisement of rights," Judge Trott explained:

> The objective of this advisement is to ensure an accused is both aware of his substantive Constitutional right to silence, as well as his continuous opportunity to exercise that right. It is no accident that the first words out of a police

> officer's mouth during a *Miranda* advisement must be: You have "a right to remain silent." This warning is required as a *procedural* safeguard, but more importantly it expresses a *substantive* Constitutional right – the right to remain silent rather than answer incriminating questions posed by the police. It is wrong, therefore, to relegate this part of the advisement to the status of "only a prophylactic device": It is a prophylactic device, but it expresses a substantive right.

Cooper, 963 F.2d at 1239-40 (emphasis in original) (citation omitted).

The court explained that the actions of the task force members in deliberately conspiring to subvert *Miranda*'s protections were "laden with police misconduct . . . 'identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed.'" *Id.* (quoting *Tucker*, 417 U.S. at 444). In *Butts*, the court of appeals made clear that "[o]fficers who *intentionally* violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions." *Butts*, 193 F.3d at 1050 (emphasis added).[4] Far from a novel or otherwise unconventional reading of this Court's decisions in *Miranda* and subsequent cases, *Cooper* and *Butts* reflect a fierce fealty to the Court's teachings, an insistence that disagreement with the Court not be permitted to become disrespect by turning its rulings into instruments undermining their very foundation.

[4] This Court denied *certiorari* in *Butts* on the same day that it decided *Dickerson v. United States*.

Prior to the court of appeals' holding in *Butts*, the practice of deliberate questioning "outside *Miranda*" was in fact widespread in California.[5] Training materials that instructed officers on the benefits of such questioning were circulated to law enforcement officers throughout the state (*see Weisselberg, supra* note 2, at 134-36), and federal and state courts had taken note of, and expressed frustration with, the practice. For example, in *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), the court of appeals overturned a murder conviction because law enforcement officials in Sacramento, California had "set out in a deliberate course of action to violate *Miranda*," employing "slippery and illegal tactics . . . deliberately designed to undermine [the suspect's] ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation." *Henry*, 197 F.3d at 1027, 1030.

[5] While the problem has been particularly acute in California, a legal bulletin published by the Federal Bureau of Investigation reports that questioning "outside *Miranda*" has been a common practice in many jurisdictions: "numerous law enforcement agencies have encouraged and provided training in this practice. . . . " Thomas D. Petrowski, Miranda *Revisited:* Dickerson v. United States, FBI Law Enforcement Bulletin: August 2001, Volume 70, No. 8, at 29 (available at http://www.fbi.gov/publications/leb/2001/aug01leb.htm). Notably, the bulletin instructs that the practice of questioning "outside *Miranda*" "has been impacted significantly by the *Dickerson* decision and now invites § 1983 lawsuits." *Id. See also* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 275-76 (1996) (noting one empirical study demonstrating that police continued to question suspects despite the suspects' invocation of their right to silence or to consult with an attorney in nearly one out of every five cases in which suspects invoked these rights).

The California Supreme Court, too, has been confronted with convictions obtained by "outside *Miranda*" questioning. In *People v. Peevy*, 953 P.2d 1212 (Cal. 1998), a San Bernardino, California detective had testified that, following the defendant's express invocation of his right to counsel, the detective "kept talking with him for impeachment purposes." *Id.* at 1215. Although the court rejected the defendant's claim that the use of non-Mirandized statements for impeachment purposes, approved by this Court in *Harris v. New York*, 401 U.S. 222 (1971), should not be permitted when the *Miranda* violation was intentional, it also unanimously rejected the view that *Miranda* and its progeny "impose no affirmative duties upon police officers, but merely establish rules of evidence." *Id.* at 1224. The court explained:

> [T]he high court has imposed an affirmative duty upon interrogating officers to cease questioning once a suspect invokes the right to counsel, and this rule regarding police conduct serves to protect the accused in determining whether to waive his or her constitutional rights. Nothing in the language of *Harris* or *Oregon v. Hass*, 420 U.S. 714 [1975], for example, suggests that the court now considers the *Miranda* or *Edwards* rules as constituting mere advice regarding preferred police conduct. Rather, the court in *Harris* referred to the *illegality* of the police conduct in that case.

Peevy, 953 P.2d at 1224 (emphasis in original). The court declined to consider "whether statements taken pursuant to . . . a *systematic* policy of police misconduct would be admissible for the purpose of impeachment," because the question had not been presented to the lower courts. *Id.* at 1226 (emphasis added).

Strong admonitory language has proved an insufficient deterrent to deliberate "outside *Miranda*" questioning by law enforcement; indeed, the California Supreme Court's disapproval of such conduct had little effect on police training.[6] Only the "additional incentive of the threat of civil rights liability" has succeeded in altering the training provided to California law enforcement officers: following the court of appeals' decision in *Butts*, the principal training sources for California law enforcement officers now advise officers that they should no longer violate *Miranda* intentionally. Weisselberg, *supra* note 6, at 1135-54. So long as there remain permissible uses for statements obtained in violation of *Miranda*, civil liability will be the lone bulwark against deliberate subversion of *Miranda*'s principles.

II. The Due Process Clause of the Fourteenth Amendment Proscribes Deliberate Non-Compliance With Constitutional Rules Governing Custodial Interrogation

Every federal court to consider the question – including this one – has agreed that egregious interrogation tactics may give rise to civil liability under section 1983 for violation of the Fourteenth Amendment's Due Process

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[6] A bulletin prepared by the Orange County, California District Attorney's office following *Peevy* described the state high court's characterization of "outside *Miranda*" questioning as illegal as "unfortunate dictum" that would "be open to serious dispute if [it] should ever form the basis of a ruling." The bulletin continued: "Meanwhile, like they say down home, 'If you've caught the fish, don't fret about losing the bait.'" Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1143-44 (2001).

Clause, without regard to the later admission of resulting statements in a criminal case. In *Dickerson*, this Court took note of those decisions, acknowledging that "there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided" – namely, "a suspect may bring a federal cause of action under the Due Process Clause for police misconduct during custodial interrogation. . . . " *Dickerson*, 530 U.S. at 442 (citing *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989)). Indeed, even prior to its decision in *Miranda*, this Court had found a violation of due process on the basis of a coerced confession, notwithstanding that the victims of the coercive practices had never been charged with a crime. *See Williams v. United States*, 341 U.S. 97, 102 (1951) ("Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees.");[7] *cf. Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) (recognizing possibility that psychological coercion leading to confession could entitle suspect to damages under section 1983).

The courts of appeals have described the showing necessary to state a due process claim for misconduct during interrogations in varying terms, but have uniformly held that civil remedies may be available for such

[7] *Williams* involved the criminal counterpart to section 1983; this Court affirmed the conviction of the offending officer even though, as the lower court observed, the "record [did] not show that either victim was ever brought to trial. . . . " *Williams v. United States*, 179 F.2d 656, 659 (5th Cir. 1950).

misconduct.[8] In challenging the decision of the court of appeals below that respondent suffered a deprivation of due process, petitioner and *amici* do not contend that misconduct during interrogations can never constitute an actionable due process violation; rather, the parties' sole dispute involves the appropriate due process standard to be applied, as well as the appropriate application of that standard. *Amicus* Criminal Justice Legal Foundation, for example, proposes a due process standard that would

[8] *See, e.g., Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 348 (2d Cir. 1998) ("A *Miranda* violation that amounts to actual coercion based on outrageous government misconduct is a deprivation of a constitutional right that can be the basis for a § 1983 suit, even when a confession is not used against the declarant in any fashion. . . . The challenged conduct must be the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.") (citations omitted); *Giuffre v. Bissell*, 31 F.3d 1241, 1258 (3d Cir. 1994) (in case involving police officers who allegedly coerced a suspect to forfeit property, "the conduct of the individual officials alleged by [plaintiff] is sufficiently conscience-shocking as to state a legally cognizable claim for a violation of substantive due process under the Fourteenth Amendment"); *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (physical injury is not an essential element of section 1983 action alleging misconduct during interrogation); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) ("There is no [requirement] . . . that physical violence need be present to produce the coercion necessary to constitute an involuntary confession cognizable under § 1983. . . . In fact, Justice Harlan in his concurrence in *Monroe v. Pape*, [365 U.S. 167 (1961),] recognized the possibility that psychological coercion leading to a confession could constitute damages under § 1983, by using it as an example of an action under § 1983 which would ordinarily not fulfill the requirements for a common law tort.") (*citing Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring)); *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) ("Extracting an involuntary confession by coercion is a due process violation. This is so notwithstanding the coercion is psychological rather than physical. Consequently, extracting an involuntary confession is actionable under section 1983.") (citations omitted).

encompass police misconduct only at the most brutal extremes: "Interrogators should be held liable under 42 U.S.C. § 1983 for violence, the deprivation of food, water, sleep, or other life necessities or threats to commit such wrongs against the suspect." *Brief of the Criminal Justice Legal Foundation in Support of Petitioner as Amicus Curiae* at 27. That standard is too narrow: as this Court has long made clear, "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

The Due Process Clause proscribes conduct by law enforcement officials that "offend[s] the community's sense of fair play and decency." *Rochin v. California*, 342 U.S. 165, 173 (1952). The clause "was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (*quoting Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (other citations omitted). In *Lewis*, the Court explained that the "cognizable level of executive abuse of power" under the Due Process Clause is "that which shocks the conscience." *Lewis*, 523 U.S. at 846. The Court has alternatively defined the due process protection as "prevent[ing] the government from engaging in conduct that . . . interferes with rights 'implicit in the concept of ordered liberty. . . .'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (*quoting Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)).

The question this case presents, therefore, is how courts should properly determine whether police misconduct during interrogation has satisfied the due process threshold. "Rules of due process are not . . . subject to mechanical application in unfamiliar territory." *Lewis*, 523 U.S. at 850. Thus, as this Court explained in *Lewis*, while

only flagrant and intentional police misconduct can be said to shock the conscience in the context of high-speed police chases, evidence of "deliberate indifference" is sufficient to state a substantive due process claim for deprivation of medical care to a jail or prison inmate. *Id.* at 851. "[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other. . . . [I]n the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory." *Id.* In contrast, a "deliberate indifference" standard is entirely inappropriate when "deliberation" itself is not possible. *Id.* Accordingly, "high-speed chases with no intent to harm suspects physically *or to worsen their legal plight*" do not give rise to liability under the Due Process Clause. *Id.* at 854 (emphasis added).

This Court's emphasis in *Lewis* on the "different circumstances" that confront government officials in the exercise of their duties points the way towards an appropriate understanding of when non-violent police conduct during interrogation should be held to violate due process: police should be liable for deliberate violations of *Miranda*'s dictates.[9] Thus, in holding that the behavior of

[9] By stating that deliberate violations of the rights protected by *Miranda* shock the conscience, *amici* by no means disclaim the relevance of this Court's traditional due process "voluntariness" cases in evaluating liability under section 1983. While the Due Process Clause prohibits the use of involuntary statements at trial, nothing in the cases applying the traditional voluntariness test constrains its application to criminal cases. Indeed, the voluntariness test has long focused upon police conduct, and prior cases suggest that the due process violation may occur at the time the involuntary statement is obtained.

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the officers in *Cooper* was beyond the pale of permissible conduct under the Due Process Clause and indisputably shocked the conscience, the court of appeals correctly emphasized the premeditated plan to "worsen [the] legal plight" (*Lewis*, 523 U.S. at 854) of any suspected rapist detained for questioning. The court explained:

> The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense – as [one officer] said, "to help keep him off the stand." By forcing [the suspect] to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. This tactic corrupts the doctrine established in *Harris* [*v. New York*, 401 U.S. 222 (1971)].

Cooper, 963 F.2d at 1249. Similarly, the evidence in *Butts* that police officers were regularly subverting *Miranda*

In *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), this Court ruled that police conduct causally related to a confession is a necessary prerequisite to finding a statement involuntary. The Court explained that absent wrongful police conduct, suppressing a statement would not "substantially deter future violations of the Constitution." *Id.* at 166 (citing *United States v. Leon*, 468 U.S. 897, 906-913 (1984)). The citation to *Leon* makes sense only if a due process violation, like a Fourth Amendment violation, is complete when the statement is obtained. Otherwise, the violation could be prevented by the simple expedient of excluding the coerced evidence at trial. This point is made even more clearly in *Miller v. Fenton*, 474 U.S. 104 (1985). There, this Court held that "the ultimate issue" in voluntariness cases is "whether the State *has obtained* the confession in a manner that comports with due process." *Id.* at 110 (emphasis added).

pursuant to an official policy set forth in training programs and materials rendered the case sufficiently egregious to satisfy the due process standard. As in the prison custodial context, where "forethought ... is not only feasible but obligatory," *Lewis*, 523 U.S. at 851, deliberate violations of the rights of criminal suspects must be measured according to a more stringent standard. The tactics advocated by "outside *Miranda*" training materials, which evince utter disregard for the teachings of this Court and contempt for the rule of law, truly shock the conscience.

To be sure, elaborate conspiracies such as those brought to light in *Cooper* and *Butts* are not a necessary prerequisite for due process liability in the interrogation context. Certainly this Court was correct in observing that, for example, the forcible extraction of evidence from a victim's stomach did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically," but plainly "shock[ed] the conscience," notwithstanding the police's urgent need to obtain evidence. *Rochin*, 342 U.S. at 172. Similarly, the conduct of the police in *Mincey v. Arizona*, 437 U.S. 385 (1978), had that case arisen in the civil liability context, would undoubtedly have been sufficient to state a claim under the due process clause; there, police officers strenuously interrogated a hospitalized man who was in "unbearable" pain, was depressed almost to the point of coma, and was encumbered by tubes, needles, and breathing apparatus. *Id.* at 398-99.

The police conduct alleged in this case, eerily reminiscent of that in *Mincey*, is shocking in its flagrant violation of this Court's clearly prescribed constitutional rules for custodial interrogation. Sergeant Chavez persisted in questioning Martinez despite Martinez's repeated

invocations of his right to remain silent and his obvious and agonizing pain. This is not a case of mere failure to give *Miranda* warnings, but of intentional disregard of an express invocation of the "right to cut off questioning." *Mosley*, 423 U.S. at 103. Sergeant Chavez ignored Martinez's pleas to be left alone. If that in itself were not sufficiently shocking, by repeatedly questioning a man in a hospital bed who believed he was dying, Sergeant Chavez inflicted emotional anguish and might well have risked interfering with Martinez's medical treatment.

If Sergeant Chavez interrogated Martinez in an attempt to obtain incriminating statements, then, according to petitioner's theory, Martinez was stripped of any possible remedy for this violation when the authorities declined to prosecute him. Ironically, had Sergeant Chavez believed all along that Martinez was simply an innocent bystander, and had he truly been interested only in obtaining information about possible police misconduct, then he would have had even *less* incentive to avoid coercive questioning. In petitioner's view, there is no remedy for innocent targets who are questioned "outside *Miranda*," or who are coerced to give information, unless the police resort to physical or psychological torture. Even assuming that *Miranda*'s exclusionary rule proved a sufficient deterrent to violations of the Fifth Amendment during the interrogation of criminal suspects, no such deterrent exists when the target of police questioning is believed to be innocent.[10] Surely it cannot be that the law proscribes

[10] The court of appeals in *Cooper* took note of the anomaly that would result if the law were to provide to the guilty civil redress that was unavailable to the innocent. The en banc court quoted Judge Noonan's dissent from the original panel decision: "The position of the court is that if unlawful police interrogation overcomes the will of a guilty suspect who

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coercion of statements for use at trial, but not coercion of statements for any other purpose. In particular, if this Court agrees with petitioner's theory and holds that the Fifth Amendment affords no protection against improper interrogation tactics, it must ensure that such tactics are adequately deterred by the prospect of civil liability under the Due Process Clause.

This Court need not be concerned that the prospect of civil liability will interfere with proper law enforcement functions. An officer who ignores *Miranda* and elicits information in order to protect public safety will have committed no wrong. *See New York v. Quarles*, 467 U.S. 649 (1984). An officer who has made a reasonable mistake concerning whether a suspect has, for example, waived his *Miranda* rights or reinitiated questioning, will be able to claim qualified immunity. And an officer who wishes to interrogate a non-suspect – for example, a material witness who has been detained for questioning – in order to obtain any type of information, may compel testimony so long as immunity is offered in an appropriate judicial setting – a setting other than the back room of a police station, the confines of a jail, or a hospital intensive care unit. Only when an officer deliberately disregards clear constitutional rules will relief under section 1983 lie.

then confesses, the suspect has been denied [his Constitutional rights] and has a civil rights action against his interrogators; but if the suspect is innocent rather than guilty and so has nothing to confess, the same kind of interrogation is no violation . . . and the innocent man has no redress for violation of his . . . rights. Our law has many subtleties and turnings, but such a counter-intuitive result cannot be, and is not, the law." *Cooper*, 963 F.3d at 1237 (citation omitted).

CONCLUSION

This Court only recently reaffirmed *Miranda*'s constitutional vitality, declaring that the Court's landmark decision could "not be in effect overruled by an Act of Congress. . . . " *Dickerson*, 530 U.S. at 432. If petitioner is correct, then every police officer in every interrogation room in this country is possessed of the authority that this Court expressly denied to Congress: the power to decide when *Miranda*'s dictates are to be observed, and when they are to be ignored. The Court must not sanction such blatant disregard for the rule of law.

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

STEVEN R. SHAPIRO
SUSAN N. HERMAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York City, NY 10004-2400
Telephone: (212) 549-2000

JOHN T. PHILIPSBORN
ERWIN CHEMERINSKY
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
Civic Center Building
507 Polk Street, Suite #250
San Francisco, CA 94102
Telephone: (415) 771-3801

MARK D. ROSENBAUM
Counsel of Record
BEN WIZNER
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026-5782
Telephone: (213) 977-9500

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v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

MARY E. ALEXANDER
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President,
The Association of
Trial Lawyers of America

JEFFREY L. NEEDLE*
Law Offices of Jeffrey Needle
119 First Ave. S.
Suite 200
Seattle, WA 98104-2533
(206) 447-1560
* *Counsel of Record*
Attorney for Amicus Curiae

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

practicing around the country primarily represent individua! plaintiffs in civil actions.

Among those plaintiffs are persons whose constitutional rights have been violated by police or government agents. In ATLA's view, the availability of a private cause of action to vindicate constitutional rights is essential to insure that the government and its agents are held accountable to the rule of law. Without the power to hold the government and its agents accountable, individual rights are only theoretical. This accountability is a basic ingredient of a free society, serving both to deter future constitutional violations and to compensate the victims of governmental abuse of power. In the absence of municipal liability, the overbroad application of qualified immunity renders constitutional rights unenforceable.

SUMMARY OF THE ARGUMENT

Broad application of qualified immunity is inimical to the quality of constitutional freedoms and inconsistent with the remedial purpose of the Civil Rights Act, 42 U.S.C. § 1983. The enlightened method of protecting public officials from civil liability and undue interference with their public functions is to prevent the constitutional violations that give rise to litigation.

Prevention of constitutional violations requires that public officials be extremely knowledgeable of constitutional law as it relates to their public functions and respectful of the limits on their authority. Exposure to civil liability creates a strong incentive for government officials to be knowledgeable and respectful of constitutional rights. Qualified immunity has the contrary effect. The legal structure of qualified immunity rewards ignorance of constitutional rights. The lack of accountability causes public officials to

disregard the limitations on their lawful authority in the name of efficiency or complete indifference.

The broader the application of qualified immunity, the greater the cost to constitutional freedoms. The application of qualified immunity has now become so broad that it threatens to swallow the cause of action. A healthy respect for constitutional rights, however, mandates that vindication be the rule and not the exception.

Nothing better illustrates qualified immunity's exceptionally broad application in the lower courts than the Petitioner's arguments in this case. Any court adopting those arguments could dismiss virtually any constitutional claim for damages. The Petitioner raises the bar so high that only legal scholars can know whether constitutional rights are "clearly established." But if it would take a legal scholar to know that particular conduct violates clearly established constitutional rights, then only legal scholars could be held liable for damages under Section 1983. Police officers and public officials generally are not legal scholars, yet they must be held accountable to the rule of law and the victims of constitutional violations must be compensated for their injuries.

One of the most frequently cited justifications in defense of qualified immunity is that competent individuals will be less inclined to work in the public sector so long as there exists the potential for large judgments being returned against them individually. This justification is specious. Qualified immunity is unnecessary to protect public officials from civil liability. The overwhelming majority of municipalities have enacted indemnification ordinances and statutes. The notion that a public official will have to pay for a

civil rights judgment is generally false. The rule that *respondeat superior* does not apply to claims for constitutional violations under Section 1983 is nothing but a legal fiction. As a practical matter, the government always pays. It is not in the public interest to sacrifice the quality of constitutional freedoms in the name of protecting the government from civil liability.

A secondary justification is that civil litigation causes disruption to the efficient operation and traditional functions of government. But the constitutional right at issue already incorporates the balancing of values between efficiency and the quality of freedom. All constitutional rights embody a basic constitutional value that government efficiency is subordinate to the right of the individual to be free from government control. Qualified immunity obviates that basic constitutional value, seeks to re-balance the equities, and subordinates individual rights in the name of governmental efficiency. Moreover, the common law from which the immunity derives didn't protect police officers with this broad type of immunity. Only highly placed executive officials were protected.

The vindication of constitutional freedoms cannot be dependent upon nation-wide judicial unanimity, which rarely exists. The existence of controlling precedent in the Supreme Court, local circuit court of appeals or district courts is sufficient for constitutional rights to be clearly established for the purpose of imposing liability. Only in the absence of controlling precedent should other decisional law be considered. In this case, controlling Ninth Circuit precedent clearly established that the Petitioner's conduct violated Respondent's constitutional rights. The existence of a split in the circuits is irrelevant.

ARGUMENT

II. THE PURPOSE OF THE CIVIL RIGHTS ACT MILITATES AGAINST BROAD APPLICATION OF QUALIFIED IMMUNITY.

Title 42 U.S.C. § 1983 provides a cause of action against any "person" who, under color of law, deprives any other person of rights, privileges, or immunities secured by the Constitution or laws of the United States. As remedial legislation, Section 1983 is to be construed generously to further its primary purpose of preserving "human liberty and human rights" and to "provide remedies for their wrong to all people."

> Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 -- the forerunner of § 1983 -- confirm the expansive sweep of the statutory [445 U.S. 636] language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:
>
> > I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provision authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again

> and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App) Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. *See Monell v. New York City Dept. of Social Services*, 436 U.S. at 683-687.

Owen v. City of Independence, 445 U.S. 622, 635-36 (1980).

The term "person" includes municipalities. *Monell v. Dep't of Soc. Serv. of N.Y.*, 436 U.S. 658, 694 (1978). Municipalities, however, cannot be held liable for constitutional torts under Section 1983 on a *respondeat superior* theory. They can only be held liable when the execution of a "municipality's policy or custom . . . inflicts the injury." *Id.* at 691, 694.[2] The

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[2] "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (plurality). Municipal liability can be established in two ways: (1) by demonstrating that the decision-making official was, as a matter of state law, a final policymaking authority "whose edicts or acts may fairly be said to represent official policy" in the area of decision, *Monell*, 436 U.S. at 694; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (plurality); *Pembaur*, 475 U.S. at 480-81; or (2) by showing that an official with final policy-making authority either delegated that authority to, or ratified the decision of, a subordinate. *Praprotnik*, 485 U.S. at 126-27; *Pembaur*, 475 U.S. at 483.

continued existence of different standards for individual liability and municipal liability and the inapplicability of *respondeat superior* have resulted in a bar to the vindication of constitutional rights that is at best difficult and often impossible to overcome. "*Monell's* basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply." *Commissioners of Bryan County v. Brown*, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting, joined by Justices Stevens and Ginsburg). "I believe that the legal prerequisites for reexamination of an interpretation of an important statute are present here. The soundness of the original principle is doubtful." *Id.* at 431. Because a municipal employer is not liable under *respondeat superior*, qualified immunity results in no liability, no accountability and no enforcement of constitutional rights.[3]

By its terms, 42 U.S.C. § 1983 "creates a species of tort liability that, on its face, admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Its language

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[3] "The absence of any damages remedy for violations of all but the most 'clearly established' constitutional rights could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy, aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined." *Owen v. City of Independence, supra*, at 651 n.33 (citation omitted).

is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). Nevertheless, this Court recognizes qualified immunity which protects government officials from civil liability insofar as their conduct does not violate constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity not only protects public officials from civil liability; it also creates an immunity from suit. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The operation of the "clearly established" standard depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Qualified immunity does not apply to municipal liability. *Owen v. City of Independence, supra.*

The breadth of the qualified immunity now recognized differs substantially from the common law tort defense upon which it was originally justified. As originally contemplated, qualified immunity protected a police officer who acted with "good faith and probable cause" where the conduct was lawful at the time of the act, but later ruled to be unconstitutional.[4]

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[4] In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that a law enforcement officer sued under Section 1983 would be entitled to immunity from liability if he arrested civil rights workers under state law that was later found to be unconstitutional but was valid at the time of the act. *Id.* at 557. In recognizing the availability of qualified immunity, the Court adhered to the existing common law tort defenses. *Id.* at 556-557. In *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court recognized that the qualified immunity now recognized by the Court is very different than the original "good faith and probable cause" defense first stated in *Pierson*. *Id.* at 165-166. In *Wyatt*, Justice Kennedy opined that since the Court is interpreting a remedial statute, it does not have the freedom of action of a court interpreting common law and that "we may not transform what existed at common law based on the notions of policy or efficiency." *Id.* at 171-172 (Kennedy, J., concurring). *See also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) ("we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law"); Stephen J. Shapiro, *Public Official's Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *And Its Progeny: A Critical Analysis*, 22 U. Mich. J. L. Ref. 249, 266-67 (1989).

The broad application of immunity articulated in *Harlow* was intended for highly placed executive officials and was never intended for police officers.[5] This expansion of the doctrine of qualified immunity represents the policy judgment that compensation for

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[5] The suggestion that every law enforcement officer should be given the same measure of immunity as a Cabinet officer or a senior aide to the President of the United States is not compelling. Testifying in court is a routine part of an officer's job; his or her participation in litigation does not occasion nearly as great a disruption of everyday duties as it would with those of a senior government official. Moreover, the political constraints that deter high government officials from violating the Constitution have only slight, if any, application to police officers, and may actually lead to more, rather than less, vigorous enforcement activity. It is thus quite wrong simply to assume that the considerations that justified the decision in *Harlow v. Fitzgerald* also justify an equally broad rule of immunity for police officers.

Anderson, 483 U.S. at 661-62 (Stephens, J., dissenting). *See also* Evan J. Mandery, *Qualified Immunity or Absolute Impunity? The Moral Hazards of Extending Qualified Immunity to Lower-Level Public Officials*, 17 Harv. J. L. & Pub. Pol'y, 479-519 (1994).

constitutional violations and the deterrence of unconstitutional conduct is subordinate to the governmental interest in effective and vigorous execution of governmental policies and programs. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 73-79 (1989).

One justification in defense of a broad application of qualified immunity is that competent individuals will be less inclined to work in the public sector so long as there exists the potential for large judgments being returned against them individually. This justification is without merit. Virtually every jurisdiction in the United States has an indemnification ordinance or statute which requires the government to indemnify its employees for any civil judgments caused by acts done within the scope of employment. *See Commissioners of Bryan County v. Brown*, 520 U.S. at 436 (Breyer, J., dissenting) (criticizing the majority for failing to consider that indemnification statutes "appear . . . in effect, [to] mimic *respondeat superior* by authorizing indemnification of employees" but conceding that "the [actual] pattern of indemnification: how often, and to what extent, States now indemnify their employees, and which of their employees they indemnify" remains unclear).[6] The notion that a public official will have to pay for a civil rights judgment is generally false. The rule of law that *respondeat superior* does not apply to claims for constitutional violations

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[6] *See also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 586-88 (1998) (discussing and citing numerous secondary authorities on the issue of indemnification and the application of *respondeat superior* under Section 1983).

under Section 1983 is nothing but a legal fiction. As a practical matter, the government always pays.

A second rationale for qualified immunity claims that the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (citations omitted).[7] In deference to this consideration, many classifications of officials are granted absolute immunity.[8] Many commentators argue that qualified immunity has become essentially indistinguishable from absolute immunity.[9] In any event, qualified

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[7] The purpose of the defense of qualified immunity is to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. at 806. *See also Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) ("One of the purposes of the . . . qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'").

[8] *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (members of Congress); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (President).

[9] *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123, 153 (1999) ("There is then a body of literature examining the discrepancy between what the qualified immunity defense was meant to accomplish and how it actually works. The defense does not protect defendants in a meaningful way. At the same time, it makes a judgment for the plaintiff almost impossible to obtain."); Alfredo Garcia, *The Scope of Police Immunity From Civil Suite Under Title 42 U.S.C. Section 1983 and* Bivens*: A Realistic Appraisal*, 11 Whittier L. Rev. 511, 534 (1989) ("[T]he individual citizen who seeks redress for a constitutional violation faces a formidable obstacle. That obstacle is the doctrine of qualified immunity for police officers as it had been developed by the United States Supreme Court."); Jonathan M. Freiman, *The Problem*

immunity was never intended to afford police officers the broad immunity now recognized. *See supra*, note 5.

The public interest mandates that the conduct of police officers be restrained by the limits of their lawful authority. Police officers and all public officials should always pause and consider whether their conduct violates constitutional rights.

> More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decision maker would be derelict in his duties if, at some point he did not consider whether his decision comports with constitutional mandates, and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it:
>
> > Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decision makers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'etre.

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of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution, 34 Idaho L. Rev. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through.").

Owen, 445 U.S. at 656, quoting Note, *Developments in the Law: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1224 (1977).

It isn't easy to be a police officer in a free society. It isn't supposed to be easy. As compared to a totalitarian society, we hold police officers to a far higher standard of professionalism. Although legal scholarship is not required, we require police officers to be very knowledgeable in criminal procedure. We require that they know the difference between probable cause and reasonable suspicion; that they know what exigent circumstances are and when they may justify a search or arrest without a warrant; that they know when and how to use deadly force; when to pursue a fleeing motorist or give up the chase; that suspects have a right to remain silent; what constitutes coercion; and a host of other rules, regulations and policies effecting the rights of citizens and the limits of police authority. These are not legal technicalities, they are the ideals that distinguish this country as a free society, and make it worth living in.

We cannot expect police officers to possibly learn and retain all this information without adequate training. But municipalities must have an incentive to intensively train their officers, and the officers must have an incentive to learn and apply their knowledge to real life situations. Because qualified immunity defines liability in terms of what an objectively reasonable public official would know, police officers and government officials generally have an incentive to argue that their ignorance of constitutional rights is objectively reasonable. This incentive is simply not in the public interest. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583 (1998). In a different context, the lack of knowledge

defended by government attorneys as reasonable would often be an insult to the intelligence of any self respecting public official. The enlightened method to avoid constitutional litigation and liability is to avoid the violations of law that give rise to that litigation. Training and respect for constitutional rights is the answer. A broad application of qualified immunity excuses ignorance of constitutional rights and renders vindication the exception and not the rule. Qualified immunity may serve to defeat liability in an alarming number of instances. But the social costs to the quality of constitutional freedoms are incalculable.

II. THE APPLICATION OF QUALIFIED IMMUNITY HAS BECOME THE RULE AND NOT THE EXCEPTION.

The qualified immunity defense has virtually swallowed the cause of action. Applying the standards argued by the Petitioner, it's a wonder that a civil rights claim could ever succeed. The Petitioner's brief in this case explains very well how broadly qualified immunity has been applied by the lower courts. According to Petitioner, "police officers are ill-equipped to pinch-hit for counsel and cannot be expected to discern whether a statement by this Court was essential to its holding, much less determine that Supreme Court dicta should be ignored in favor of 'binding precedent' of the court of appeals." *See* Pet. Brief at 39. The Petitioner argues in effect that the police officer in this case would have to be a legal scholar to objectively know whether his conduct violated constitutional rights. But if this is true, then only legal scholars could ever be liable for constitutional violations. Public officials are not legal scholars, and the ability to enforce

and vindicate constitutional rights cannot be limited to those claims brought against law professors at state universities. In order to be knowledgeable about constitutional rights, law enforcement officers receive training by lawyers capable of making fine legal distinctions. Based upon this training, law enforcement officers should be presumed to know the law.[10]

> Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Owen v. City of Independence, supra at 655.

The Petitioner asserts that under a substantive due process analysis a constitutional violation requires a balancing of interests which forecloses a violation of clearly established rights. According to Petitioner, "[i]n the absence of a *precedent precisely on point*, that hurdle

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10 The responsibility for keeping abreast of constitutional developments in criminal law rests squarely on the shoulders of law enforcement officials. "Given the power of such officials over our liberty, and sometimes even our lives, this placement of responsibility is entirely proper. Law enforcement officials must be cognizant not only of how far their authority extends, but also of the point at which their authority ends." *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986). *See also Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) (Government officials are charged with knowledge of constitutional developments, including all available decisional law), *cert. denied*, 490 U.S. 1075 (1989); *Melton v. City of Oklahoma*, 879 F.2d 706, 731 (10th Cir. 1989) (Officials are presumed to know and abide by the law; qualified immunity will fail even when the official spoke with counsel before taking action), *vacated on other grounds on rehearing en banc*, 928 F.2d 920 (10th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).

is especially difficult for a plaintiff to surmount in this context because no police officer can be expected to predict with *perfect accuracy* the after-the-fact judgment of the courts." Pet. Brief at 37 (emphasis added). Precedent precisely on point is unnecessary.[11] Perfect accuracy is not required. Common sense is relevant to the inquiry about whether the contours of the right at issue were clearly established. Fair warning is all that is required.[12]

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[11] Cases need not be "materially similar" to defeat qualified immunity. *Hope v. Pelzer*, 536 U.S. ___, 122 S.Ct. 2508; 153 L.Ed 2d 666 (2002). To defeat qualified immunity, plaintiff must establish that the contours of the right violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The specific action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law. *Id. See also Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."). "The qualified immunity regime of clearly established law should not be held to allow Section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law." *Wood v. Ostrander*, 851 F.2d 1212, 1218 (9th Cir. 1988).

[12] *See Hope v. Pelzer, supra*, 122 S. Ct. at 2516 ("Our opinion in *Lanier* thus make clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances"); *United States v. Lanier*, 520 U.S. 259, 271 (1997) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"). This Court in *Lanier* also cited a particularly cogent observation from the Seventh Circuit: "[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the official would be immune from

At least some courts have agreed that where a constitutional right depends upon the balancing of interests, a public official cannot be expected to know in advance how those interests will be balanced, and therefore the right is not clearly established for the purpose of imposing liability. Some courts have held that where a balancing of interests is required, the right is rarely clearly established and can rarely be vindicated.[13] The ability to enforce constitutional rights has been severely diminished because of the application of qualified immunity and the frequency

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damages liability." *Lanier*, 520 U.S. at 271, quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir.1990). *See also Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) ("'when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous preexisting case law is not required to show that the law is clearly established") (*quoting Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993).

[13] A First Amendment violation within the context of employment "requires particularized balancing on the unique facts presented in each case." *Voigt v. Savell*, 70 F.3d 1552, 1560-61 (9th Cir. 1995). Because, under the *Pickering* balancing test, the determination whether an employee's expression is constitutionally protected requires a fact-sensitive, context-specific balancing of competing interests, the law regarding public-employee free speech claims will "rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under Harlow and its progeny." *Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 980 (9th Cir. 1998), *citing Kincade v. City of Blue Springs*, 64 F.3d 389, 398 (8th Cir. 1995); *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir.1995); *O'Connor v. Steeves*, 994 F.2d 905, 917 n. 11 (1st Cir. 1993); *Guercio v. Brody*, 911 F.2d 1179, 1183-85 (6th Cir. 1990); *Melton v. City of Oklahoma City, supra*, 879 F.2d at 729; *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989); *Novola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.1986).

with which the balancing of interests is used as a standard. *E.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (applying a Fourth Amendment balancing test to drug testing); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (applying a balancing approach to procedural due process).[14] The application of qualified immunity when balancing is required to determine a constitutional violation is dramatically inconsistent with the broad remedial purpose of Section 1983, and has been broadly criticized. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261 (1995).

III. BINDING PRECEDENT IN THE SUPREME COURT, LOCAL CIRCUIT COURT OF APPEALS OR DISTRICT COURT DETERMINES WHETHER CONSTITUTIONAL RIGHTS ARE CLEARLY ESTABLISHED.

The Petitioner further asserts that constitutional law is not clearly established because there exists a split in the circuit courts of appeals. Pet. Brief at 40, 43.[15] But

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[14] *See also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 984-86 (1987) (explaining the Supreme Court's shift toward a balancing approach); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 Nw. U.L. Rev. 641, 642 (1994) (explaining how the Court has increasingly relied on a balancing methodology).

[15] The role of state decisional law relevant to the qualified immunity inquiry remains unsettled. *See, e.g., Ward v. County of San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987) ("the pronouncement of one state court on a constitutional issue does not necessarily shield a government official from liability. . . . [particularly] in light of contrary authority from the federal courts . . . ."). Because state courts seldom examine federal constitutional claims, few federal courts have found state decisional law to be dispositive. *See* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 Ariz. L. Rev. 621 (1993).

if the vindication of constitutional rights is dependent upon unanimity among the circuit courts of appeals, then constitutional rights will rarely be enforceable because a split in the circuits is extremely commonplace. The existence of clearly established law cannot be dependent upon whether a court in a different jurisdiction renders a contrary opinion. The law of other jurisdictions is only relevant to the extent that there exists no authority on the particular question in the Supreme Court, local federal circuit or district court. "*Absent binding precedent*, we look to all available decisional law, including the law of other circuits and district courts, to determine whether the right was clearly established." *Lum v. Jensen*, 876 F.2d 1385, 1387 (9th Cir.1989), *cert. denied*, 493 U.S. 1057 (1990) (emphasis added).[16]

The Petitioner argues that "[t]he only precedent of which we are aware that could have alerted

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[16] *See also Harper v. Campbell*, 943 F.2d 51 (6th Cir. 1991) ("if a district court can cite 'binding precedent by the Supreme Court, its court of appeals, or itself,' it can find a right to be clearly established and deny qualified immunity to the offending official"); *Norfleet v. Arkansas Dep't of Human Services*, 989 F.2d 289, 291 (8th Cir. 1993) ("In the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits and district courts"); *Wilson v. Layne*, 526 U.S. 603 (1999) (granting qualified immunity where police allowed media to accompany police search where "[p]etitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely").

petitioner to particular circumstances in which interrogation alone *would* be held to violate the Fourteenth Amendment is *Cooper, supra.*" (Emphasis original). Pet. Brief, at 42. Contrary to the representations of Petitioner, this should have been enough. In this case, the Ninth Circuit law was abundantly clear to anyone but clever lawyers seeking to avoid civil liability for their clients.

In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), an *en banc* panel of the Ninth Circuit ruled explicitly that a statement coerced by police officers need not be actually offered as evidence at time of trial in order to constitute a constitutional violation. *Id.* at 1244.

> Many things are clear in this passage, but in the context of the present case, one is particularly relevant: the due process violation caused by the coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself. . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution.

Id. at 1244-45. There is nothing ambiguous about this language. Clearly, Petitioner does not agree with this rule of law, and cites cases from other jurisdictions which might contradict it. But no objective reasonable official could deny that within the Ninth Circuit this rule was clearly established.

Petitioner asserts that *Cooper*, and every other case relied upon by the lower Court, is distinguishable. In part, Petitioner distinguishes *Cooper* because there "[t]he primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own

defense" and second "it was conceded that the officers were not facing exigent circumstances." Pet. Brief, at 42.

Although the Court in *Cooper* considered the Task Force's purpose, nowhere in the opinion is it suggested that this unlawful purpose was the dispositive consideration. To the contrary, in finding that the conduct of the Task Force violated substantive due process, the Court explicitly ruled that the conduct was being measured "against the Constitutional canons of decency and fairness as elaborated in Parts VI and VII, and . . . other relevant considerations which we find aggravating this context." 963 F.3d at 1249. Clearly, this was one but not the only reason or even the primary reason for the Court's ruling.

The Petitioner next asserts that exigent circumstances justified his reckless disregard for Respondent's right to be free from coercion while in great pain, mortally wounded by police officers and dying in the hospital. The alleged exigent circumstances claimed by Petitioner were the need to obtain evidence before Martinez died of his injuries. Pet. Brief, at 34-35. But those circumstances do not justify the failure to give *Miranda* warnings. In *Quarles v. New York*, 467 U.S. 469 (1984), the Court recognized a "public safety" exception to *Miranda*. "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657. "We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659. The Court acknowledged that this was a "narrow exception" to the

Miranda rule. *Id.* at 658. *See also Oregon v. Elstand*, 470 U.S. 298, 317 (1985) ("The Court has carefully adhered to this principle [*Miranda*], permitting a narrow exception only where pressing public safety concerns demanded").

Clearly, the public safety exception to *Miranda* does not apply to this case. Martinez was mortally wounded and dying in the hospital. He posed no danger to anyone. Nor did Petitioner believe that he possessed knowledge which could be useful in preventing an immediate danger to others. Notwithstanding Petitioner's efforts to obfuscate the clarity of this narrow exception, Supreme Court jurisprudence on this issue is clearly established and cannot form the basis for qualified immunity.

Martinez was shot multiple times by a police officer. One bullet struck him in the face, damaging an optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. 270 F.3d at 854. As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview.

> The medical staff asked Chavez to leave the trauma room several times, but the tape shows that he returned and resumed questioning. Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. . . . [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more. Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

270 F.3d at 855. Applying existing Ninth Circuit law, no reasonable law enforcement officer could justify this conduct. Common sense and traditional notions of common decency are far more compelling and persuasive than Petitioner's efforts to create fine legal distinctions for every case relied upon by the lower court. The efforts to distinguish *Cooper* and other cases represent a "rigid, overreliance on factual similarity" that this Court rejected just last term in *Hope v. Pelzer*, 122 S. Ct. at 2517. In the case at bar, the Petitioner's conduct was so patently violative of the constitutional right that any reasonable official should have known without additional guidance from the courts that the action was unconstitutional. Petitioner had more than fair warning. *See United States v. Lanier*, 520 U.S. at 271 ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

A broad application of qualified immunity is destructive to the quality of constitutional freedoms and the broad remedial purpose of Section 1983. The enforcement of constitutional rights must be the rule and not the exception.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY L. NEEDLE
Law Offices of Jeffrey Needle
119 First Ave. S.
Suite 200
Seattle, WA 98104-2533
(206) 447-1560
Attorney for Amicus Curiae

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BEN CHAVEZ,
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Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE 50 CALIFORNIA CITIES IN SUPPORT OF PETITIONER AND REVERSAL

GIRARD FISHER
Counsel of Record

POLLAK, VIDA & FISHER

1801 Century Park East, 26th Floor
Los Angeles, California 90067
(310) 551-3400

Attorneys for Amici Curiae
50 CALIFORNIA CITIES

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THE AMICI CURIAE 50 CALIFORNIA CITIES

The 50 California Cities, as political subdivisons of a state, file their amici curiae brief without consent or motion pursuant to this Court's Rule 37.4. These are the Cities of:

ALAMEDA	MOUNTAIN VIEW
ALBANY	NATIONAL CITY
AVALON	NOVATO
BAKERSFIELD	ORANGE
BRISBANE	ORINDA
BURBANK	PALM DESERT
CAPITOLA	PALM SPRINGS
CHINO	PIEDMONT
CHULA VISTA	PLEASANT HILL
COACHELLA	REDONDO BEACH
CORTE MADERA	ROSS
COTATI	SACRAMENTO
CULVER CITY	SAN ANSELMO
DEL REY OAKS	SAN DIMAS
DINUBA	SAN LUIS OBISPO
HAYWARD	SAN PABLO
HOLLISTER	SANTA CRUZ
INGLEWOOD	SANTA ROSA
IRWINDALE	SIGNAL HILL
LAGUNA BEACH	SUNNYVALE
LAKEWOOD	SUTTER CREEK
LODI	TIBURON
LYNWOOD	WALNUT
MARINA	WESTMORLAND
MONTEREY	YREKA

QUESTIONS PRESENTED

1. Whether a police office who takes an involuntary statement from a criminal suspect can be held liable to the suspect under Title 42 U.S.C. section 1983 for a violation of the Fifth Amendment, or under Fourteenth Amendment "involuntariness" jurisprudence, when the suspect is not criminally prosecuted.

2. Whether, in the same circumstances, the officer can be held liable to the suspect under section 1983 for a violation of Fourteenth Amendment substantive due process if the officer did not intend to harm the suspect, did not physically or mentally harm him, and had a legitimate reason for questioning him.

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INTEREST OF THE AMICI CURIAE

The Court's decision will affect the ability of local law enforcement authorities to gather information for crime investigation, witness protection, internal review, and other legitimate state purposes.

THE SCOPE OF REVIEW

Amici Curiae request this court to address, not just the qualified immunity, but also the validity of the respondent's underlying Fifth and Fourteenth Amendment claims. This Court can and should undertake that inquiry. "[I]n any action under [Title 42 U.S.C. section 1983], the first step is to identify the exact contours of the underlying right said to have been violated."[1] Here that step would enable this Court to clarify fundamental questions about whether police officers may be held liable under the Fifth and Fourteenth Amendments for taking involuntary statements from criminal suspects. This brief focuses on fundamental questions rather than the qualified immunity.

SUMMARY OF ARGUMENT

The Fifth Amendment does not prohibit police from taking an involuntary statement from a suspect before criminal proceedings are initiated against him. The text of the Amendment, its history, and the decisions of this Court establish that government can violate the Fifth Amendment only at the time of trial.

The Fourteenth Amendment due process protection against involuntary statements likewise attaches only at the time of trial. A bulwark against self-incrimination fashioned

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[1] *Lewis v. County of Sacramento,* 523 U.S. 833, 840 n.5 (1998).

before this Court applied the Fifth Amendment to states, "involuntary" jurisprudence should not be expanded beyond the scope of the Fifth Amendment itself.

The damages remedy under Title 42 U.S.C. section 1983 for a violation of Fourteenth Amendment substantive due process should apply only when police interrogation tactics "shock the conscience."

Thus, there is a range of police interrogation tactics that entitles a criminal suspect to invoke the Fifth Amendment privilege at trial, but not the section 1983 damages remedy if they do not "shock the conscience." Petitioner Chavez's conduct falls within that permissible range. As explained in the last section of this brief, it is important to acknowledge the existence of that range, because the taking of involuntary statements often serves legitimate state interests without violating suspects' constitutional rights.

FACTS IN BRIEF

These facts, derived from the District Court's Order,[2] are offered to place the Amici Curiae's arguments in context. Amici Curiae defer to the Brief for the Petitioner for a more detailed statement.

During a scuffle with two police officers, Respondent Martinez allegedly grabbed the gun of one and pointed it in a threatening manner at both. The other officer shot Martinez in the temple, abdomen and knee.

After Martinez was taken to the hospital, Petitioner

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[2] Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Adjudication ("Order"), entered August 2, 2000.

Chavez, also a police officer, questioned Martinez while hospital personnel treated him and prepared him for surgery. Chavez tape-recorded the questioning intermittently over a period of 45 minutes. Because of interruptions for medical treatment, the actual questioning spanned 10 minutes. On tape, Martinez admitted grabbing the gun and pointing it at the officers.

Chavez did not give Martinez the *Miranda* warnings before questioning him. Chavez persisted in the questioning even though Martinez twice asked him to stop. Martinez, yelling in pain and drifting in and out of consciousness, repeatedly told Chavez that he was dying and did not want to talk.

Martinez was never prosecuted for a crime in connection with this incident.

PROCEDURAL HISTORY

The District Court Proceedings

Respondent Martinez filed a complaint in the District Court against Petitioner Chavez and others. The operative First Amended Complaint alleges, among other things, that Martinez is entitled to damages under Title 42 U.S.C. section 1983 based on the theory that Chavez's interrogation violated Martinez's Fifth and Fourteenth Amendments rights. Although alleging that Martinez's statement was extracted involuntarily, the First Amended Complaint alleges only one kind of damage that resulted from the interrogation: "interfer[ence] with [Martinez's] right to receive medical care and treatment."[3]

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[3] *Id.* at para. 17, p. 6, ll. 22-23.

Martinez moved for summary adjudication on his Fifth and Fourteenth Amendment claims; and Chavez filed a cross-motion for summary adjudication on his qualified immunity defense. The District Court, finding the facts "remarkably similar to those in *Mincey*,"[4] held that:

> "plaintiff's statement was coerced in clear violation of his constitutional rights. Accordingly, plaintiff is entitled to summary adjudication of his claims for violations of the Fifth and Fourteenth Amendments."[5]

At the same time, the District Court denied Chavez's motion for summary adjudication on the ground of qualified immunity. On that defense, the court emphasized that "the law against coerced confessions was clearly established at the time of [respondent's] interview" and that "given the circumstances of the interview and established constitutional boundaries, respondent was not entitled to qualified immunity."[6]

The Circuit Court of Appeals Proceedings

Chavez took an interlocutory appeal from the District Court's denial of his motion for summary adjudication on qualified immunity. The Ninth Circuit affirmed, holding that "Chavez violated the Fourth and Fifth Amendments by subjecting Martinez to a coercive, custodial interrogation while he received treatment for life threatening gunshot

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4 *Mincey v. Arizona*, 437 U.S. 385 (1978).

5 Order, *supra*, pp. 7-8.

6 *Id.* at p. 13.

wounds inflicted by other police officers."[7] Following its earlier decisions in *Cooper*[8] and *Butts*,[9] the court held it did not matter that Chavez was never prosecuted. Positing that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity,'"[10] the court held that "[e]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's Fifth Amendment rights," and likewise his Fourteenth Amendment rights.[11] The court concluded that in light of the "extreme circumstances of [the] case," a reasonable police officer in Chavez's position could not have believed that the interrogation of Martinez comported with the Fifth and Fourteenth Amendments. On that basis, the court held that the qualified immunity was not available to Chavez.[12]

What The District Court and Court of Appeals Did *Not* Find

The District Court's order and Court of Appeal's decision are noteworthy for what they did *not* find. Neither court

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7 *Martinez v. City of Oxnard*, 270 F.3d 852, 856 (9th Cir. 2001).

8 *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992).

9 *Butts v. California Attorneys for Criminal Justice*, 195 F.3d 1039 (9th Cir. 1999).

10 *Martinez v. City of Oxnard, supra*, 270 F.3d at 857, quoting *Cooper, supra*, 963 F.2d at 1239 and (in internal quotes) *Miranda v. Arizona*, 386 U.S. 436, 457-58 (1966).

11 *Martinez v. City of Oxnard, supra*, 270 F.3d at 857.

12 *Id.* at 859.

found that Chavez's interrogation tactics "shock the conscience" or amounted to a "deliberate indifference" to Martinez's well-being. Neither found that Chavez denied or interfered with respondent's medical treatment – indeed the District Court found that there was insufficient evidence to establish that Chavez interfered with Martinez's medical treatment.[13] The District Court did not find that Chavez's interrogation was intended to cause severe emotional distress – or that Martinez did in fact suffer any such distress as the result of the interrogation. On this point the Court of Appeals merely speculated that, even though Martinez was never prosecuted, a person in Martinez's position could reasonably believe that his statements might be used in a criminal prosecution or lead to other evidence that might be used against him.[14]

Finally, neither court evaluated whether there was a legitimate state interest in pressing ahead with Martinez's questioning at the hospital, although the District Court noted that both Chavez and Martinez may have been under the impression that Martinez was dying; and that Chavez wanted to obtain information about his fellow officers' possible culpability for the shooting.[15]

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[13] Order, *supra,* at p. 8.

[14] *Martinez v. City of Oxnard, supra,* 270 F.3d at 857 (citing *Miranda, supra,* 484 U.S. at 1243, and *Kastigar v. United States,* 406 U.S. 441, 445 (1972).

[15] Order, *supra,* p. 13.

ARGUMENT

The Fifth Amendment Attaches Only When Incriminating Statements Are Introduced at Trial

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." (Emphasis added.) The text plainly means that a criminal defendant may invoke a privilege against self incrimination in the course of a trial. But there are no textual or historical reasons that lead one to conclude that the drafters meant more, and that they intended the Fifth Amendment to prohibit government from taking an involuntary statement from a suspect before criminal proceedings are initiated against him.

The Text

There is no such text – an interrogation of a suspect before initiation of criminal proceedings is not part of the "case." One need only compare the words of the Fourth and Fifth Amendments to see that the Bill of Rights treats other investigatory intrusions differently from the privilege against giving testimony against oneself. The Fourth, acknowledging that criminal investigations involve matters of degree, proscribes only "unreasonable" searches – whether before or during the "case"; whereas the Fifth declares an absolute prohibition against taking testimonial evidence from the accused in the limited circumstance of a "case."

Reasonableness is a logical guiding principle for criminal investigations; but when the Fourth and Fifth Amendments are read together, the absolute prohibition of the Fifth makes sense only as a protection accorded to a defendant at trial. Had the drafters also intended to prohibit the taking of

involuntary statements from suspects in custody, presumably they would have done so in the same way that they regulated the taking of physical and documentary evidence: broadly to cover all circumstances under a "reasonableness" standard as in the Fourth; not narrowly as a absolute prohibition in the Fifth. Any other interpretation renders the phrase "in any criminal case" meaningless.

Consistent with the above, this Court has previously "recognize[d] that unreasonable searches under the Fourth Amendment are different from unwanted interrogation under the Fifth Amendment,"[16] and that the Fifth Amendment's "strictures, unlike the Fourth's are not removed by a showing of reasonableness."[17] Further, this Court has assumed, without explicitly deciding, that a constitutional violation of the Fifth occurs only at trial; whereas a violation of the Fourth is "fully accomplished" at the time of an unreasonable governmental intrusion.[18] Unlike the Fourth Amendment, the Fifth Amendment provides a fundamental *trial* right.[19]

The Historical Background

There are no historical underpinnings for a theory that the drafters of the Bill of Rights intended to prohibit government

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[16] *Dickerson v. United States*, 530 U.S. 428, 441 (2000), citing *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

[17] *New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984).

[18] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), citing *Kastigar v. United States*, *supra*, 406 U.S. at 453 as to the Fifth Amendment, and quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974) as to the Fourth Amendment.

[19] *Withrow v. Williams*, 507 U.S. 680, 691 (1993).

from taking involuntary statements from criminal suspects. Colonial Americans did not recognize a free-standing "human right" against self-incrimination.[20] Protection against coerced confessions existed primarily to safeguard a liberty of more pressing importance – the right to a fair jury trial.[21] In that vein, colonial provisions against coercive self-incrimination sought not to expand, but merely to preserve values embedded in the English common law.[22] James Madison's original draft of the Bill of Rights may have implied a more all-encompassing protection: "No person . . . shall be compelled to be a witness against himself."[23] Significantly, however, the phrase was objected to as a "general declaration in some degree contrary to laws passed" in the First Congress, and the narrowing language "in a criminal case" was added.

The limitations imposed by Congress suggest that the purpose of Fifth Amendment was to safeguard the truth-seeking function of the jury trial, not to regulate pretrial interrogation of criminal suspects. The obvious inference is that police compulsion does not violate the Amendment unless compelled statements are brought before the jury. Commentators acknowledged the exclusionary nature of the rule as early as 1819: "No man shall be compelled to give evidence against himself. Hence it is held that if a criminal be sworn to his incrimination taken before a justice, *it shall not*

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[20] *See* Moglen, *Taking the Fifth: Reconstructing the Origins of the Constitutional Privelege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1112 (1994).

[21] *Id.* at 1113.

[22] *Id.* at 1121.

[23] United States Congress, Debates and Proceedings in the Congress of the United States 434 (Washington D.C. 1834).

be read against him."[24]

Recent scholarship demonstrates that the Fifth Amendment afforded no protection against the taking of the unsworn statement itself. At the time the states adopted the Bill of Rights, routine criminal process required justices of the peace to take unsworn statements from criminal suspects. As the study by Eben Moglen concludes:

> "American criminal procedure in the colonial period, like the English model it closely followed, assumed the testimonial availability of the defendant at the crucial pretrial stage of the prosecution and freely made use of the defendant's admissions at trial."[25]

And as explained by Albert W. Alschuler:

> "What the Fifth Amendment privilege did not prohibit is in fact clearer than what it did. The privilege did not prohibit the forceful incriminating interrogation of suspects by judges and magistrates so long as the suspects remained unsworn."[26]

Those interrogations served as the basis for the summary disposition of lesser offenses and as evidence in criminal trials. That procedure endured well into the Nineteenth Century; and neither the courts nor practitioners regarded it as

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[24] Moglen, *supra,* at 1128, quoting William W. Hening, *The New Virginia Justice, Compromising the Office and Authority of a Justice of the Peace* 132 (Richmond, Va. T. Nicolson 1795). (Emphasis added.)

[25] *Id.* at 1129.

[26] Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 Mich. L. Rev. 2625, 2653 (1996).

violating the Fifth Amendment prohibition against compelled testimony – the reason being that only *sworn* testimony fell within the concept of undue coercion.[27]

This historical background shows that the drafters of the Bill of Rights could not have intended the Fifth Amendment to prohibit the taking of the unsworn testimony from a criminal suspect. "A more promising hypothesis is that the Framers saw no tension between their courtroom procedures [allowing the use of unsworn statements] and the principles that they declared in the Constitution."[28]

The historical background suggests that today there is a gap in the protections afforded by the Fourth and Fifth Amendments that the drafters of the Bill of Rights did not perceive. That gap is the lack of an explicit standard applicable to statements taken from a criminal suspect *before* the institution of criminal proceedings. That gap exists because for a considerable period of time – spanning the colonial period, the drafting of the Bill of Rights, and early Nineteenth Century criminal procedure – unsworn statements, even if resulting from forceful interrogation, were not considered to be the result of unacceptable compulsion.

Should this Court nonetheless assume that the absolute prohibitions of the Fifth Amendment logically extend to the taking of an involuntary statement from a criminal suspect before the initiation of criminal proceedings? Apart from the undesirability of writing new text into the Constitution, the differences between the Fourth and Fifth Amendments demonstrate that such an extension of the Fifth Amendment

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[27] *Id.* at 2659-2660.

[28] *Id.* at 2657.

would be seriously mistaken. As already discussed, when the drafters clearly addressed procedures that might occur *before* the initiation of criminal proceedings – *i.e.* searches – they imposed a "reasonableness" standard. If inclined to indulge in extrapolations about how the drafters would have approached the question of interrogations of criminal suspects, one must conclude that the Fourth Amendment provides better clues than the Fifth.

The Miranda Rules Pertain Only to the Admissibility of Evidence

In *Miranda*, this Court summarized its holding as follows:

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not *use* statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the *defendant* unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[29]

In the sentences that followed, this Court succinctly outlined the familiar *Miranda* warnings and rules.

None of the *Miranda* warnings or rules purport to be constitutional rights in and of themselves. Although this Court recently held that they are constitutionally based,[30]

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29 *Miranda v. Arizona,* 384 U.S. 436, 444. (Emphasis added.)

30 *Dickerson v. United States, supra,* 530 U.S. 428.

those warnings and rules are prophylatic only. They are intended to protect criminal *defendants* from the *use* of their incriminating statements, because that is all that the Fifth Amendment prohibits. In *Dickerson,* this Court expressed reservations about its prior decision in *Miranda,* but deferred to precedent: "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.[31] Given those reservations, it would be strange indeed to hammer the shield of *Miranda* into a sword of a damages remedy on the anvil of Title 42 U.S.C. section 1983.

Legal Precedent Holds That The Fifth Amendment Does Not Bar Involuntary Statements

Although this Court has not squarely addressed whether police violate the Fifth Amendment when they compel an involuntary statement, it has decided that government may compel such statements in other contexts. For example, the "Immunity Doctrine" holds that the government can force witnesses to testify to self-incriminating acts as long as it grants them immunity.[32] Despite the protections of the Fifth Amendment, immunized witnesses who refuse to testify can be jailed.[33] The Immunity Doctrine clarifies that it is the *use* of compelled statements, as opposed to the compulsion itself, that violates the Fifth Amendment.

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31 *Id.* at 444.

32 *See Kastigar v. United States, supra,* 406 U.S. 441.

33 Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 Yale L.J. ___, ___ (forthcoming December 2002) (Section I.A.2).

Similarly, the "Penalty Cases" demonstrate that the government may also use economic sanctions to compel witnesses to testify to potentially self-incriminating acts.[34] Thus, government may lawfully fire employees for refusing to answer incriminating questions about their official duties.[35]

The overwhelming majority of Circuit Courts of Appeal have applied this principle[36] to police interrogations:

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[34] *Id.* at ___ (section I.A.3).

[35] *Leftkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).

[36] Announcing a single "principle" is an oversimplification, because the courts have addressed four different circumstances in which an involuntary statement may have been taken. In ascending order of coercive pressure, they are:

1. *Failure to Mirandize*: Police fail to give the *Miranda* warning to a suspect before taking a statement, but do not exert physical or psychological pressure to make him speak. An irrebuttable presumption of compulsion for purposes of admission of evidence arises. *See Oregon v. Elstad, supra*, 470 U.S. 298.

2. *Compelled Statement*: Government forces potential witness to speak by threatening contempt of court or job termination. *See* the "Immunity" and "Penalty Cases" discussed in the text. Courts use a categorical approach to determine whether the statement was compelled, focusing on the nature of the official pressure generally. *See* Clymer, *supra* note 17, at section III.B.1; *Garrity v. New Jersey*, 385 U.S. 493 (1967).

3. *Coerced Statement*: Police unlawfully exert pressure on a suspect to such a degree that his will is overborne. *Colorado v. Connelly*, 479 U.S. 157 (1986). Courts use a case by case approach when determining if coercion was used, taking into account the totality of all the surrounding circumstances. *Schnecklothe v. Bustamonte*, 412 U.S. 218 (1973).

4. *"Shock the Conscience"*: Police methods to obtain evidence from the suspect are so extreme that they "offend those canons of decency and fairness which express the notions of justice." *Rochin v. California*, 342 U.S. 165, 169 (1952).

Appendix "A" shows the position of this Court and the Circuit Courts of Appeals on whether any of these four levels of involuntary statements violates the Fifth or Fourteenth Amendments. The decisions cited in notes 32, 35 and 37-43 are the basis for the Appendix.

The Second Circuit:

> "Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding."[37]

The Third Circuit:

> The Ninth Circuit *Cooper* decision broke new ground when it held that substantive violation of Fifth Amendment rights could occur absent use of statements against defendant. Thus, interrogating officers are entitled to qualified immunity.[38]

The Fourth Circuit:

> "Most courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a

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[37] *DeShawn v. Safir*, 156 F.3d 340, 346-37 (2nd Cir. 1998).

[38] *Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994).

criminal proceeding."[39]

The Seventh Circuit:

> "The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case."[40]

The Eighth Circuit:

> "Remedy for a *Miranda* violation is the exclusion fr >m evidence of any compelled self-incrimination, not a section 1983 action."[41]

The Tenth Circuit:

> No rational argument can be made that failure to read *Miranda* rights triggers Sec. 1983 liability, where statements are not introduced at trial.[42]

The Eleventh Circuit:

> Continued interrogation after defendant requests an attorney does not create a cause of action for Section 1983 damages when statement is not used at trial; the

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39 *Riley v. Dorton*, 115 F.3d 1159, 1164 (7th Cir. 1997).

40 *Wilkins v. May*, 872 F.2d 190, 194 (5th Cir. 1989).

41 *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989).

42 *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

> *Cooper* majority departed from the clear requirements of Sec. 1983.[43]

The Ninth Circuit swims alone against this tide of legal authority in *Cooper*,[44] *Butts*,[45] and the decision now under review, *Martinez*.[46] For all the reasons stated above, the Ninth Circuit is wrong in holding that police can violate the Fifth Amendment during the interrogation of a criminal suspect. This Court should overrule the Ninth Circuit on this point.

The Fourteenth Amendment "Involuntariness" Jurisprudence Should Not Be Confused with "Substantive Due Process"

Cooper notes that the Due Process Clause of the Fourteenth Amendment protects against two types of self-incrimination.[47] One is the use of "involuntary" statements at the time of trial. The line of authority in support of this protection holds that any criminal trial use of defendant's involuntary statement is a denial of due process.[48] It applies the Due Process Clause to "prevent fundamental unfairness in

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43 *Jones v. Cannon*, 174 F.3d 1271, 1290-91 (11th Cir. 1999).

44 *Cooper v. Dupnik*, *supra*, 963 F.2d 1220.

45 *California Attorneys for Criminal Justice v. Butts*, *supra*, 195 F.3d 1039.

46 *Martinez v. City of Oxnard*, *supra*, 270 F.3d 852.

47 963 F.2d at 1245, 1249.

48 *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

the *use* of evidence, whether true or false."[49] "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to *convict* a defendant."[50] This line of authority defines an involuntary statement as one that results from "police overreaching"[51] or that is not a "product of a rational intellect and a free will."[52]

Until the Ninth Circuit's decision in *Cooper*, courts used "involuntariness" jurisprudence only to preclude use of involuntary statements *at trial*. No other Circuit has used this "involunariness" jurisprudence to fashion a damages remedy under Title 42 U.S.C. section 1983, although the Second Circuit suggested in *DeShawn* that such a remedy might exist if the taking of involuntary testimony "amounts to actual coercion based on outrageous government conduct."[53]

It is important to trace the provenance of this "traditional 'test of voluntariness.'"[54] It developed before this Court made the Fifth Amendment applicable to the states in *Malloy*.[55] In the absence of a Fifth Amendment protection against the admission of involuntary statements, this Court provided an

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[49] *Lisenba v. California*, 314 U.S. 219, 236 (1941) (Emphasis added).

[50] *Malinski v. New York*, 324 U.S. 401, 404 (1945) (Emphasis added).

[51] *Colorado v. Connelly, supra*, 479 U.S. at 163-64.

[52] *Mincey v. Arizona, supra*, 437 U.S. at 398.

[53] *DeShawn v. Safir, supra*, 156 F.3d at 346-37.

[54] *Martinez v. City of Oxnard, supra*, 963 F.3d at 1248.

[55] *Malloy v. Hogan*, 378 U.S. 1 (1964).

equivalent protection through the Due Process Clause.[56] And as noted, like the Fifth Amendment, that protection attached *only* at the time of trial.

After *Malloy*, retention of "involuntariness" jurisprudence became optional. This Court observed that "[w]e have never abandoned this due process jurisprudence . . . but our decisions in *Malloy* and *Miranda* changed the focus of much of the inquiry [to the Fifth Amendment]."[57] Although "involuntariness" jurisprudence has not been abandoned, there is no reason to believe that it should be extended beyond the Fifth Amendment rule of exclusion to create a civil damages remedy under Title 42 U.S.C. section 1983 for a violation of the Fourteenth Amendment Due Process Clause. Only the Ninth Circuit assumes so.

The second type of due process violation occurs when government extracts evidence not only involuntarily, but in a manner that "shock[s] the conscience," including physical torture[58] and bodily intrusion.[59] Until *Cooper*, no case had found a defendant liable for *damages* under section 1983 for extracting testimony in a manner that "shock[s] the conscience," although in one case government agents were found criminally liable under section 20 of the Criminal Code [now Title 18 U.S.C. 242] – the criminal code analog of 42 U.S.C. section 1983 – for beating suspects to extract a

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[56] See cases cited at notes 48-52.

[57] *Dickerson v. United States, supra*, 530 U.S. at 434.

[58] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[59] *Rochin v. California, supra*, 342 U.S. 165.

confession.[60] There government agents engaged in a "brutal deprivation[] of constitutional rights."[61]

Certainly there is no principled objection to finding that a violation of due process occurs at the time an involuntary statement is *taken* if government's tactics in extracting the statement "shock the conscience." Indeed, the circumstances that the Second Circuit hypothesized in *DeShawn, supra*, would seem to fall within this category.

Cooper, however, found that the police officers' conduct in that case violated *both* the "involuntariness" jurisprudence and "shock the conscience" standards, and predicated civil liability on both. Assuming for the sake of argument that the Ninth Circuit correctly decided that the officers' aggressive interrogation of the "Prime Time Rapist" suspect "shock[s] the conscience," and that they could be held liable on that basis, it nevertheless erroneously assumed that they might also be held liable merely because they continued to interrogate the suspect after he had asked them to stop and to provide him with an opportunity to speak with his attorney. In that regard, the Ninth Circuit impermissibly confused the traditional "involuntariness" jurisprudence and the "shock the conscience" standard, with the end result that *both* have become independent bases for section 1983 liability in the Ninth Circuit. This confusion is of no small moment, because in *Butts*[62] and *Martinez*[63] there were no findings that the

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[60] *Williams v. United States*, 341 U.S. 97 (1951).

[61] *Id.* at 104.

[62] *California Attorneys for Criminal Justice v. Butts, supra*, 195 F.3d 1039.

[63] *Martinez v. City of Oxnard, supra*, 270 F.3d 852.

police interrogations "shock the conscience."

The clear implication of *Cooper*, *Butts*, and *Martinez* is that police who elicit involuntary statements from criminal suspects *always* violate the Fifth and Fourteenth Amendments, regardless of whether the suspects are criminally prosecuted and regardless of the circumstances surrounding their interrogations. The chilling impact of such a rule on police investigations should be obvious. At a minimum, this Court should hold that no liability can arise merely as the result of taking a suspect's involuntary statement that is not offered as evidence of his guilt at trial. And, as argued in the next section, this Court should go a step further and acknowledge that there are many situations – including the Martinez shooting incident – where the state has a legitimate interest in obtaining an involuntary statement.

The Taking of an Involuntary Statement Violates Substantive Due Process Only If Police Tactics "Shock the Conscience" and Serve No Legitimate State Interest

There are two theories under which a plaintiff m[illegible]ring a substantive due process claim.[64] Under the first, [illegible] must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. The analysis in the preceding sections shows that, with respect to this theory, respondent Martinez has been pursuing a willow-the-wisp. There are no Fifth or Fourteenth Amendment guarantees against the taking of an involuntary statement. The *Miranda* "right to remain silent" is not a constitutional right, but only a prophylactic measure designed to protect the Fifth Amendment privilege in criminal trials. Yet it is on the

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[64] *See Cruz-Erozo v. Rivera-Montanez*, 212 F.3d 617, 621-622 (1st Cir. 2000) for an articulation of these two theories followed here.

basis of a violation of this supposed "right" that the District Court and Circuit Court of Appeals erroneously based their decisions.

Under the second substantive due process theory, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but must prove that the state's conduct is arbitrary, oppressive, and harmful – generally measured by the "shock the conscience" standard.[65] The "shock the conscience" standard, however, is problematic. In announcing it, this Court acknowledged the difficulty of achieving an objective measure that avoids *ad hoc* decision-making.[66] Thus, the "shock the conscience" standard may be viewed as an effort to raise the bar of liability sufficiently high to avoid the charge that the due process clause is too "indefinite and vague"[67] for enforcement. To complicate the analysis, the standard may be "deliberate indifference" in some cases.[68] These problems lead litigants and courts to grapple with, not only the question of what standard applies in any given case, but also the meaning of the standard applied.

In approaching these problems, it may be useful to consider, not so much the standards or their definitions, but the factors that this court has considered in determining

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[65] *Lewis v. County of Sacramento, supra*, 523 U.S. at 850 ("[D]eliberate indifference can rise to a constitutionally shocking level").

[66] *Rochin v. State of California, supra*, 342 U.S. at 171-172.

[67] *Id.* at 172.

[68] As this court observed in *Lewis v. County of Sacramento, supra*, 523 U.S. at 852, "deliberate indifference can rise to a constitutionally shocking level."

whether there has been a violation of substantive due process. These include the arbitrariness of the conduct; the intent to harm; the opportunity for deliberation; and the harm inflicted. Each of these factors might be viewed as a continuum, with conduct falling at one end tending to confirm liability, but at the other to negate it. If this approach is used, one must come to the conclusion that Chavez's conduct falls far below the level of culpability required for a substantive due process violation.

Arbitrariness: This court has emphasized that "the touchstone of due process is protection of the individual against arbitrary action of government."[69] Arbitrariness is one end of this continuum, while legitimate state interest is the other. With respect to the latter, this court has held that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscious shocking level."[70] In that connection, it is noteworthy that Chavez, a supervising officer, was attempting to investigate his subordinate officer's role in the Martinez shooting. The District Court described his motivation in negative terms: "[B]ecause this was an officer-involved shooting, Chavez was clearly trying to obtain information that could clear the officer of wrongdoing."[71] But even if the District Court was justified in casting Chavez's motivations in a dim light, his search for evidence to explain

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[69] *Lewis v. State of California, supra*, 523 U.S. 833, quoting *Wolffe v. McDonnell*, 418 U.S. 539, 558 (1994).

[70] *Id.* at 849. *See also Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) ("[A]ction that is legally irrational in that it is not sufficiently keyed to any legitimate state interests," quoting *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)).

[71] Order, *supra*, p. 13.

the shooting represented a legitimate state interest. Oddly, the District Court added that "although this information is not protected by the Fifth Amendment, Chavez's motivation was certainly not to assist plaintiff."[72] The recognition that the information was not protected by the Fifth Amendment is significant; but whether or not Chavez desired to "assist" plaintiff is not. This lack of assistance does not negate the legitimate state interest of getting to the bottom of the Martinez shooting.

It is surprising that, for summary adjudication purposes, the District Court offered an opinion about whether, subjectively, Chavez was pursuing a legitimate purpose in interviewing Martinez. For one thing, there was plenty of evidence that would support the opposite conclusion that Chavez intended to evaluate his subordinate officers' role in the shooting and preserve Martinez's recollection in the event of his death.[73] But more importantly, the District Court should have applied an *objective* standard. Recently, the California Supreme court considered, in a regulatory takings case, whether it should apply a subjective or objective standard to determine whether a governmental agency's actions "substantially advance[d] a legitimate state interest."[74] It held that "the proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the

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[72] *Id.*

[73] *See* Petitioner's Brief at Statement section.

[74] *Galland v. City of Clovis*, 24 Cal.4th 1003, 16 P.3d 130, 103 Cal.Rptr.2d 711 (2001).

latter."[75] That view is similar to this Court's holding in *Whren* that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional . . . [T]he fact that the [law enforcement] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[76]

Here there is ample evidence to conclude, on an *objective* standard, that Chavez interviewed Martinez, not in an arbitrary abuse of his authority as a law enforcement officer, but in the pursuit of a legitimate state interest. Thus, Chavez's conduct falls at the low end of the "arbitrariness" continuum.

Intent to Harm: In reviewing substantive due process claims, the courts have considered states of mind that range from "deliberate intent to harm physically or legally" to "negligence" – with "gross negligence" and "reckless disregard of life" somewhere inbetween. Chavez certainly acted in a deliberate manner in interrogating Chavez, but there is no evidence that he intended to *harm* Chavez. Again, Chavez's conduct falls at the low end of the continuum.

Time for deliberation: At one end of this continuum are high speed vehicle pursuits and other situations that require police officers to make "snap judgments;" on the other are circumstances where public officials have ample time to contemplate the likely consequences of their conduct. Prime

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[75] *Id.* at 24 Cal.4th at 1035, 16 P.3d at 152, 103Cal.Rptr.2d at 735, n.6.

[76] *Whren v. United States*, 517 U.S. 806, 813 (1996), quoting *Scott v. United States*, 430 U.S. 128, 138 (1978).

examples of the latter are correctional officers who control the medical care of prisoners[77] or public employers who establish the work conditions of their employees.[78] Here, Chavez's opportunity to reflect on the consequences of this actions would fall towards the middle of this continuum. Certainly he reacted to events as they unfolded; but he was not faced with a split-second decision either.

Harm Inflicted: This continuum ranges from death to de minimus injuries.[79] Inbetween lie physical injury, seizure of property, and verbal harassment – although the latter is seldom the basis for liability. "[E]ven extreme verbal abuse typically is insufficient to establish a constitutional violation."[80] Here there is no evidence that Chavez harmed Martinez. As noted, the First Amended Complaint alleged that Chavez interfered with Martinez's medical care and treatment, but the District Court found that there was insufficient evidence to support this claim.[81] Substantive due process claims almost always result from *physical* abuse. None occurred here. And Marinez did not allege that he suffered any psychological damage from his interrogation. The Court of Appeal's speculation that a person in his position might "believe" that his statement would lead to prosecution hardly brings this case within the range of the

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77 See *Bell v. Wolfish*, 441 U.S. 520 (1979).

78 See *Collins v. Harker Heights*, 503 U.S. 115 (1992).

79 See *Cruz-Erazo v. Rivera-Mantanez, supra*, 212 F.3d 617 and *Riley v. Darton*, 115 F.3d 1159 (6th Cir. 1996) for cases denying a substantive due process remedy for de minimus injuries.

80 *Abeyta v. Chama Valley Independent Sch. Dist.*, 77 F.3d 1253, 1256 (10th Cir. 1996).

81 Order, *supra*, p. 8.

"shock the conscience" or "deliberate indifference" standards. Thus, Chavez's conduct falls at the low end of the "harm inflicted" continuum.

Taken as a whole, the above factors argue that Chavez's conduct cannot possibly be viewed as "conscience shocking." However, Amici Curiae wish particularly to emphasize the legitimate state interest behind Chavez's interrogation of Martinez. That is because there are many situations in the law enforcement context where questioning a criminal suspect may serve important concerns other than – or in addition to – securing the conviction of the suspect. For instance, the elicited information may be used for:

- Protection of victims and witnesses;
- Law enforcement officer safety;
- Internal review for the purposes of discipline and development of policy;
- Identifying someone other than the suspect who perpetrated the crime;
- Exoneration of the suspect or others;
- Prevention of further crime by the interview subject, even at the expense of forfeiting the prosecution of the suspect – a factor involved in the *Cooper* interrogation;
- Preservation of the recollection of a suspect who is at the point of death, or may otherwise be unavailable, since there may not be a "second chance" to obtain that information; and

- National security.

One might question the legitimacy of one or another of these objectives, but by the same token, other valid concerns may be added to the list.

The reality of these concerns indicate that there is something terribly amiss in the Ninth Circuit Court of Appeals' approach to the Fifth and Fourteenth Amendments as applied to the interrogation of criminal suspects. One must ask, "what is wrong with a criminal justice system that protects a criminal suspect from self incrimination at trial, but permits government to elicit involuntary statements from him for other legitimate purposes?" The Ninth Circuit has not asked that question, and nothing it has said in *Cooper*, *Butts*, or *Martinez* satisfactorily answers it. That important question surfaces in the present case. Amici Curiae urge this court to answer that there is nothing wrong with such a system of justice; and to hold that the Fifth and Fourteenth Amendments are not violated at the time an involuntary statement is taken from a criminal suspect and that, unless an interrogation is truly "conscience shocking," there can be no substantive due process violation for eliciting an involuntary statement that serves some legitimate state purpose.

CONCLUSION

For the above reasons, Amici Curiae respectfully request the court to reverse the judgment of the Court of Appeal.

Respectfully submitted,

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GIRARD FISHER*
POLLAK, VIDA & FISHER
1801 Century Park East
26th Floor
Los Angeles, CA 90067
(310) 551-3400
*Counsel of Record

APPENDIX "A"

How The Federal Courts Stand On The Fifth And Fourteenth Amendment Protections

1 = United States Supreme Court
2 = 3rd, 4th, 8th, 10th, 11th Circuits
3 = 2nd Circuit
4 = 9th Circuit

(Increasing Police Pressure) →

Issues	Courts	Failure to Mirandize	Compelled Statement	Coerced Statement	Shocks the Conscience
Introduction of statement in case in chief violates 5th	1 thru 4	YES	YES	YES	YES
Introduction as impeachment violates 14th	1 thru 4	NO	NO	YES	YES
Compulsion a per se violation of 5th	1 thru 3 4	NO **YES**	NO **YES**	NO **YES**	NO **YES**
Coercion a per se violation of 14th	1 and 2 3 and 4	NO NO	NO NO	NO **YES**	YES **YES**